Supreme Court, U.S.
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No. 86-5375

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER A. BURGER,
Petitioner,

v.

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

JOSEPH M. NURSEY *
MILLARD C. FARMER
P.O. Box 1978
Atlanta, Georgia 30301
Telephone: (404) 688-8116
Counsel for Petitioner

MICHAEL J. BOWERS
Attorney General
State of Georgia
WILLIAM B. HILL, JR.*
Senior Assistant
Attorney General
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Telephone: (404) 656-3359
Counsel for Respondent

* Counsel of Record

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 30, 1986
CERTIORARI GRANTED NOVEMBER 3, 1986

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

DATE	NR	PROCEEDINGS
1980		
OCT 02	03	PETITION for Writ of Habeas Corpus
	05	ORDER granting application for a stay of execution.
NOV 26	11	ANSWER of deft to complaint
DEC 01	12	MOTION of Petitioner for discovery
01	13	BRIEF in support of Petitioner's motion for discovery
04	14	MOTION of pltf to amend petition
04	15	BRIEF in support of pltf's motion to amend petition
12		HEARING on petitioner's motion for discovery
12	16	BRIEF in support of respondent's answer
1981		
FEB 21	17	ORDER denying taking of depositions as petitioner requested Granting motion to amend petition and grant a hearing to be held on 3/4/81.
27	19	AMENDMENT to petition for writ of habeas corpus
27	20	RESPONSE AND ANSWER to petitioner's amendments to his petition for the writ
MAR 04	21	MOTION of petitioner for leave to amend petition, with brief

DATE	NR	PROCEEDINGS
1981		
04	22	MOTION of petitioner to present evidence by affidavits, or alternatively. to take depositions.
04	23	BRIEF of petitioner in support of motion to present evidence by affidavits.
04		HEARING held in Savannah on evidence as to allegations now in petition.
30	26	RESPONSE of deft to petitioner's motion to present evidence by affidavits or alternatively to take depositions
APR 29	30	ORDER vacating petitioner's sentence and remanding his case for further proceedings
29	31	JUDGMENT entered this date remanding this case to the Superior Court of Wayne County
MAY 11	32	NOTICE OF APPEAL from the Courts Order dated April 29, 1981
11	33	MOTION of defts to stay judgment of the Court
13	34	ORDER that Court's judgments of April 29, 1981 be stayed to allow the Respondents to complete litigation through the appellate process
21	35	NOTICE of cross-appeal
21	36	APPLICATION for certificate of probable cause to authorize cross appeal
21	37	MEMO in support of application
28	39	ORDER from Court of Appeals allowing appellee to proceed in forma pauperis.

DATE	NR	PROCEEDINGS
1982		
FEB 29	42	JUDGMENT from Court of Appeals reversing decision of District Court Remanded to District Court in accordance with the opinion of Ct. of appeals.
MAR 06	43	ORDER adopting the judgment of the COA as judgment of this Court
SEP 04	44	JUDGMENT from Court of Appeals adopting decision of Supreme Court, remanding case to district court with instruction that within 90 days it extend or revise its findings, and if appropriate, its conclusions and judgment.
OCT 10	45	ORDER finding petitioner's claim of ineffective assistance of counsel is without merit.

SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

EXCERPT OF TESTIMONY OF CLARENCE HAIRE

First Trial, *State of Georgia v. Christopher A. Burger*

Indictment No. 77-1641

January 23 and 24, 1978

[Transcript pages 140-141, 278-289]

* * * *

EVIDENCE—CLARENCE HAIRE

* * * *

DIRECT EXAMINATION BY

MR. THOMAS:

Q For the record, would you state for us, please, sir, what is your name, sir?

A Clarence M. Haire.

Q Mr. Haire, what is your occupation, please, sir?

A Special Agent with the United States Army.

Q All right, sir. Who is your immediate boss man?

A Mr. Berzenski.

Q All right, sir. I'll ask you, sir, were you working in that capacity on or about September 4, 1977?

A Yes, sir.

Q I'll ask you, sir, I show you this object marked "S 23", and ask you to look at that particular object for us, please, sir, and see if you can identify for us what do you call that object I just handed to you, sir?

A It's a U. S. Army boot, sir.

Q All right, sir. For what foot is that?

A For the right foot.

Q The right foot. All right, sir. Where was that object the first time you saw it, sir?

A It was sitting along Georgia State Highway 144, on Fort Stewart, Georgia, between Landing Number Two and Landing Number Three.

Q All right, sir. Did you have occasion to be out there on that particular occasion with your boss man, Mr. Berzenski?

A Yes, sir.

Q All right, sir. How do you know that is the same boot that you saw there on that particular occasion, sir?

A Because my initials appear on the inside of the boot; the date and the time appear therein, sir.

* * * *

Q (Mr. Thomas) Now, I'll ask you, Mr. Haire, please, sir, to tell us, please, sir, what statement, if any, did Mr. Burger make to you and Mr. Brewer on that occasion, please, sir?

A Mr. Burger was subsequently asked what he knew about the missing taxi-cab driver, and he initially related that he had no knowledge of what we were talking about. After informing him that we received information that he had picked—had a taxi-cab in Savannah, and that someone—I also made a statement that there was someone in the trunk of the taxi-cab on the night of 4 September. He subsequently stated that he would make a statement concerning what he knew about the incident at that time.

He then was subsequently informed of his rights again. And, after being verbally informed of his rights, he went in and made a statement as to the missing taxi-cab driver.

Q All right, sir. You say you informed him again of his rights?

A Yes, sir, re-emphasized his rights to him.

Q All right, sir. Then, at that time, please, sir, what statement, if any, did he make to you?

A Mr. Burger related that during the evening of 4 September, '77, he and a friend by the name of Stevens were at the Enlisted Men's Club, Fort Stewart, Georgia, and that they had been drinking beer, and they ran out of money. Related that after they ran out of money, they left the club to return to their unit that's located in the National Guard Training Area at Fort Stewart, Georgia.

He then stated that enroute to their unit, Stevens asked him if he knew out they could get some money; or, at least he made the statement to Stevens—Burger that he knew how they could get some money. And, Burger stated how. And, he said that Stevens told him by robbing a taxi-cab driver. He said that they then went on over to their unit as to where they went to their orderly room, and while at the orderly room, they called a Shuman taxi-cab. He said that Shuman taxi came approximately a few minutes later. And, at the time the taxi arrived, that they went out to the taxi and observed that there were two men in the taxi, the driver and one other occupant.

He stated they went out there and after seeing that there were two men in the vehicle, they made some comment to the taxi-cab driver as to where the other man was going, and he told him that he was going to Savannah, and they told the taxi-cab driver they did not want to go to Savannah. He said at this time he left and went back to the orderly room and while they were in their unit orderly room, that PFC Botsford called from Savannah, and he spoke with their CQ, who was a person by the name of Chipman. He said that Chipman was talking to Botsford at the airport in Savannah, and that Chipman asked him if he wanted to talk to Burger, and Botsford told him yes. He said at this time that Burger answered the telephone, and that he then talked to Botsford who was at the Savannah Airport.

Burger then stated after talking to Botsford he told Botsford that they would pick him up. He said that Botsford asked him who he meant by "they", and he told him Stevens. He said that after talking to them then he hanged the telephone up, and then he went back to his billets where he obtained some cigarettes from their wall locker, and then they went to the dining facility located in the National Guard Training Area. He stated that one of the doors was opened to the dining facility. They subsequently went into the dining facility, and obtained a butcher knife and a knife sharpener.

He said that Stevens wanted the knife sharpener. So Stevens kept the knife sharpener, and he took the butcher knife. He stated that they then went to the corner of A Company, Fifty and Thirty-second Armor where there was a telephone on the outside of the building, and they subsequently called a cab from the D &M Taxi-Cab Company in Hinesville. He stated that he told the cab that they wanted to go to Savannah.

He related that approximately five minutes later the taxi-cab arrived. He said that when the taxi-cab arrived they asked the driver if he had change for Fifty Dollars, and the driver indicated that he had change, or at least he could get change for Fifty Dollars. He stated they subsequently got inside the taxi-cab. He got in the front right passenger side. And, that Stevens got in the rear. He said that they had a pre-arranged signal as to where when one of them asked for a light or a cigarette, that this was the signal to rob the taxi-cab driver.

He said that enroute to Savannah at approximately fifteen miles after they had left the National Guard Training Area on Georgia State Highway 144 the signal was given. He said that at this time, Stevens placed the knife sharpener around the man's neck, and that he placed the butcher knife to the man's ribs. He said the cab driver then pulled over without anyone saying anything to him. He said that Stevens then told the taxi-cab driver to get outside of the vehicle. He said that he and

Stevens both then got outside the taxi-cab, and that Stevens asked the man for his money. He said that the man—that after the man gave Stevens the money, Stevens made the comment that he only had Sixteen Dollars. He said that Stevens then handed him Eight Dollars of the money. He said that they then asked the taxi-cab driver if he had any more money, and he said that was all that he had. He said that they then told the taxi-cab driver to get back in the vehicle in the rear, and that he, Burger, then got under the driver's seat of the vehicle, and that Stevens got in the right front passenger seat of the vehicle. He said that they then started enroute to Savannah.

He said that right after they started up, that Stevens told the taxi-cab driver to remove his boots. He said that after the man removed his boots, that Stevens looked through the man's boots to see if he had any money concealed in his boots. He said that Stevens then had the man to remove all his clothing, a piece at the time. He said that Stevens then searched the man's clothing to see if he had any money, and that he did not have any money.

He said that as he searched the clothing that Stevens threw the clothing out of the car. He said that they then proceeded on towards Savannah, toward I-95, and that prior to them getting to I-95 that—or after throwing the money—the clothing out of the vehicle, Stevens then started going through the glove compartment and under the seats of the vehicle, looking for money. Stevens thought the man still—the taxi-cab driver had more money inside the vehicle. He said that Stevens could not find any. He said that after getting on I-95, that Stevens made the statement to the taxi-cab driver that he should make him perform an act, a homosexual act upon him. And, then he stated that Stevens then said, "I will." He said that Stevens then got into the rear of the vehicle with the taxi-cab driver, where Stevens forced the taxi-cab driver to perform an act of oral sodomy on him. He said that Stevens after this was completed,

Stevens then performed an act of anal sodomy on the taxi-cab driver.

He said that they then proceeded on to Savannah. The taxi-cab driver's eyes had been blindfolded in the meantime, and that Burger kept asking the taxi-cab driver as to which road he had to turn off to get to the Savannah Airport. He said that Stevens then—the taxi-cab driver asked him where they were located at on the interstate, and that he would tell the taxi-cab driver, and then the taxi-cab driver would tell him where to turn off at. He said they missed the turnoff to the Savannah Airport, and they went on to the Garden City Exit. He said that when they arrived at the Garden City Exit, they exited the interstate, went down and made a turn around. He said that after exiting the Garden City Exit that they came to a parking lot where they stopped, took the taxi-cab driver out of the vehicle and placed him in the trunk of the vehicle. He said that they then started back up and continued on toward the Savannah Airport.

He said that enroute to the Airport that he asked the taxi-cab driver who was in the trunk by calling out as to what exit he was to take to the airport. He said the taxi-cab driver told him. He said that after they got to the Savannah Airport there was a police vehicle sitting in front of the airport. He said that they then parked out in the parking lot rather than parking up in front of the airport. He said that Stevens then went inside the airport as to where he got Botsford, and that then he pulled the vehicle back up approximately eight lengths behind the police vehicle in front of the airport.

He said that Botsford and Stevens then got inside of the vehicle. They returned to Fort Stewart. Excuse me. Prior to returning to Fort Stewart, he said that Botsford asked him if he had started driving a taxi-cab, and he said that he told Botsford no. He said that Stevens then made the comment that they had took the taxi-cab, and Botsford told him, made the comment to him that he didn't believe it.

He said that he then called out and asked the man if he was okay back there, and he said that the man in the trunk told him yes. He said, "Okay, shut up." He said then that Botsford appeared that he had kind of a dead look on his face, as though he couldn't believe what had occurred. He said that they then returned to Fort Stewart, and enroute to Fort Stewart Stevens made the comment about going to Jacksonville Beach. He said that Botsford said he initially would go with them; however, they would have to return to Fort Stewart and get his car.

Q Just a minute, please, sir.

[NOTE: Whereupon a class of highschool students left the courtroom.]

THE COURT: All right, sir. Proceed.

A He said that Botsford then told him enroute that he did not want to go with them to Jacksonville Beach, just to return him to the Post. He said that he and Stevens then returned Botsford to the Post, and that enroute or somewhere along the line Stevens made some indication that they were going to kill the taxi-cab driver. He said that as Botsford got out of the vehicle at Fort Stewart, and as Botsford was departing the vehicle, Botsford asked them not to kill the taxi-cab driver. And, he also said that Botsford told them not to get burnt.

He said that after Botsford left that he and Stevens then came to Jesup, as to where they road around on some dirt roads, making the car go from side to side, causing the man to roll around in the trunk. He then stated that they came up to a Jack's Minit Market in Jesup, as to where Stevens went inside the Minit Mart to purchase some sandwiches and some milk, and said that he at that time removed the dome light from the taxi-cab, and placed it in some bushes by Jack's Minit Mart. He said that while they were sitting there a patrol car or a police car came up, and that he walked

away from the vehicle toward the Minit Mart. He said that the vehicle, police car—he didn't know what it was doing, so he went inside or started inside, and Stevens was coming out of the Minit Mart.

He said that Stevens seen the vehicle, patrol vehicle, so Stevens took the sandwiches and the milk, and placed it on top of some type of box outside the door of the Minit Mart. He said that he and Stevens then went back inside the Minit Mart, and he asked Stevens if he seen the—or Stevens asked Burger if he had seen the patrol vehicle, and Burger made the statement as to why do you think I'm in here purchasing cigarettes. He said that they then went back and looked back outside the Minit Mart, and the patrol car was gone.

He said they both then went and got into the vehicle and started driving away. He said shortly after they departed the area that the vehicle came up behind them, and that he asked Stevens if that was a patrol vehicle. He said that Stevens told him that he didn't think so.

THE COURT: Let's suspend again just a moment so we can get quiet again.

[NOTE: Whereupon other students left the courtroom.]

THE COURT: All right, sir, proceed again.

A He said that after making the turn at the traffic light that he then observed that it was a patrol car behind them. He said that he then, observing that it was a patrol car, the patrol car started following him, or appeared that he was following him, so they drove up a road as to where they stopped. He said that they pulled up into the road, the patrol car went by. He said that they sat there, and after the patrol car went by, they then started up again and started back out. He said when they came back out, they had seen the patrol car again. So they pulled up in someone's yard.

He said that after they pulled up into the yard the patrol car then disappeared so they then left. He said

at this time Stevens told him or indicated to him that they were going to get burnt, and they had to do something with the vehicle. He said that Stevens then told him to go to a pond which he and Burger went to often here in Jesup. He said that he then drove the vehicle to pond where he pulled up to the—the vehicle facing the pond, and then Stevens told him they had to wipe the finger-prints off the car. He said that after wiping the car then Stevens told him to get inside the car and drive the car into the pond. They said at this time he got in there and started the car, put it in gear and it ran over into the pond.

He said that after the car went into the pond he started to walk away, and Stevens asked him where he was going, and he said that he was leaving. He said that Stevens told him that you can't leave, because we have to make sure—want to make sure the car goes down, with the man in the trunk. So he then stated there until the car went down, and then Stevens and he departed the area, where they went to motel located off 82, and tried to call a taxi-cab driver to return to Fort Stewart. He said that they could not—after an hour or so they could not get a taxi-cab so one finally came by. They stopped him, and that the man returned them to the same area as to where they initially took the taxi-cab from.

Q All right. I'll ask you, sir, what, if anything, did he state to you with reference to the CB radio in that particular car?

A Enroute to Savannah they took the knife, cut the cord off the CB, and tied up the taxi-cab driver's hands. Also, when they arrived at the lake or the pond, they took the CB radio out and threw it into some bushes.

Q All right, sir. Then did you ask any questions, any further questions, sir?

A Yes, sir, I did.

Q What questions were that?

A May I refer to the notes, sir?

Q Yes, sir.

A Burger was asked if he knew what type of underwear the taxi-cab driver was wearing, and he stated that he did not.

Burger was also asked if the taxi-cab driver was in the vehicle when he drove it into the pond, and he stated yes, sir. He was asked why he and Stevens killed the taxi-cab driver, and he stated to keep him from identifying them.

He was asked what time the D & M taxi-cab picked them up at the orderly room of A Company, Fifth Battalion, 32nd Armor, Fort Stewart, Georgia, and he related about 2200 or 2230.

Q What time is that in regular times?

A That's 10:00 P.M. or 10:30 P.M., sir. He was asked as to what time he arrived at the airport to pick up Botsford, and he related he was not sure, but he thought it was about 2400, which is midnight. He was asked if he committed any type of sexual offenses or acts with the taxi-cab driver, and he stated no. He was asked where the taxi-cab driver's wallet was, and he stated that it was thrown out of the car on Georgia State Highway 144 by Stevens. He was asked where the taxi-cab driver's military identification card was, and he stated that he thought it was in the wallet at the time Stevens threw it out. He was asked if he knew the color of the wallet, and he stated that it was black.

He was asked where the knife and knife sharpener were that he and Stevens used during the incident. He stated that it was placed in the front seat of the vehicle. He asked what time he returned from the airport with Botsford at Fort Stewart. And, he stated that he thought it was about 0130 5 September, '77.

He was asked what time he arrived in Jesup, Georgia, and he related it was between 0200 and 0215, 5 September, '77. He was asked what time it was when he drove the vehicle into the pond, and he stated that it was about 0300. He was asked what time he arrived back

at Fort Stewart after he and Stevens killed the taxi-cab driver, and he related that it was about 0400, 5 September, '77.

He was asked if he was threatened in any way during the interview. He stated no. He was asked if he was promised anything in order for him to make this statement, and he stated no. He was asked if he made this statement because he wanted to make it of his own free will, and he stated yes. He was asked if he had anything to add to this statement, and he stated no.

Q All right, sir. At the time he gave you this statement, sir, how was it that this statement was taken down?

A It was initially written out in long hand, sir.

Q All right, sir. Then what was done with it subsequently?

A I typed it up, sir.

Q All right. I'll ask you, sir, in reference to the pond, what statement, if any, did Mr. Burger relate to you in reference to the location of the pond?

A He initially stated that it was located at a—in the vicinity of a trailer park, which after contacting the police in Hinesville we assumed it was a trailer park within the Hinesville, Georgia area. He then stated that it was not there, that he would have to—that he would not be able to tell us where the pond was, that he would have to point the pond out to us.

Q All right, sir. In his statement sir, how was it that he used the word "he went to the pond often" in reference to Stevens and Burger? For what purpose did he say to you, if any, that they went to that pond?

A For swimming, sir.

Q All right, sir. How was it that you went to that pond on that particular occasion on that night, sir?

A Mr. Raymond Brewer, myself, another agent from my office went to the pond with Burger due to the fact that he stated that he would take us to the pond and point it out, as to where he had driven the car.

Q All right, sir. How was it that you all were able to locate the pond where that car was driven into?

A He pointed it out to us, sir.

Q All right. You rode with him in the automobile to Wayne County, sir?

A Yes, sir.

Q All right. In his statement to you, who did he say drove the car into the pond, cranked it up and drove it into the pond, sir?

A He stated that he did, sir.

Q All right, sir. Then, I'll ask you, sir, about how long was it, sir, that—how much time was taken up or consumed during the time you were talking to him in reference to your leaving Fort * * *.

* * * *

SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

EXCERPT OF TESTIMONY OF F. J. SHUMAN

First Trial, *State of Georgia v. Christopher A. Burger*

Indictment No. 77-1641

January 23 and 24, 1978

[Transcript pages 199, 345-346]

• • • •

EVIDENCE—F. J. SHUMAN

F. J. SHUMAN, after taking the aforesaid oath, and having been called as a witness for the State in this hearing, testifies as follows:

DIRECT EXAMINATION BY

MR. THOMAS:

Q State for us, please, sir, what is your name, sir?
A F. J. Shuman.
Q I'll ask you, sir, were you working as a detective for and on behalf of Wayne County, Georgia on September 13th, 1977?
A Yes, sir, I was.
Q Did you have occasion to see one Mr. Christopher A. Burger on September 13th, 1977, sir?
A Yes, sir, I did.
Q Do you recall about what time of the evening of that day it was that you saw him, sir?
A Yes, sir, I do.

Q Approximately what time was it?

A It was the time of the morning. It was about thirty minutes after midnight, the 13th day of September.

Q All right, sir. Where was it that you saw him at on that occasion?

* * * *

THE COURT: All right, Mr. Thomas.

MR. THOMAS: Your Honor, would you like for me to continue with Mr. Shuman. I have just a question or two.

THE COURT: All right.

EVIDENCE—F. J. SHUMAN (Recalled)

F. J. SHUMAN, having been recalled, testifies as follows:

DIRECT EXAMINATION BY

MR. THOMAS:

Q Mr. Shuman, I believe you stated that on the night of the 14th, when you talked with Mr. Burger . . .

A Yes, sir.

Q Was it on the night of the 13th that you talked to Mr. Burger?

A Yes, sir, both times.

Q All right, sir. In relation to the water hole, what, if anything, did Mr. Burger say to you at that time?

A Other than verifying that he had driven the automobile in, he said that when the car went into the water he and Stevens ran up the road for fifty or sixty yards, and they returned where the car had gone in the water to see if it had gone under.

He further related that the vehicle floated out from the bank and was some approximately twenty to twenty-five feet from the bank.

Q All right, sir. When was the last time Mr. Burger said he saw Mr. Honeycutt?

A I asked Mr. Burger if he knew whether the man was alive or not, in the trunk. And, he said, "yes, sir,

he was." And, I said, "How do you know?" He said, "Just before the car went in the water on the bank Mr. Stevens was away from the car, throwing the CB radio into the bushes. . . .

MR. LEAPHART: Your Honor, we would at this point renew our objection to any statement made by Mr. Burger, or testifying as to any statement made by him on the ground that any statement to Mr. Shuman is the result of the illegal and unconstitutional statement or confession, or admissions against interest, made to Mr. Haire, at the CID Headquarters at Fort Stewart.

THE COURT: I overrule your objection. Let the record so show.

Q (Mr. Thomas) You may continue, please?

A He said that he, while Mr. Stevens was away from the vehicle disposing of the CB radio, he raised the trunk and asked the man in the trunk was he all right. The man replied, "Yes, sir." And, he closed the trunk down. By that time Mr. Stevens had returned and they put the car in the water, drove it off the bank.

Q Who drove the car off the bank?

A Mr. Burger said that he drove the car.

Q Mr. Burger?

A Yes, sir.

MR. THOMAS: We yield the witness.

MR. LEAPHART: I don't have any questions, Your Honor.

THE COURT: You may go down, Mr. Shuman.

Witness excused.

THE COURT: What do you have next?

MR. THOMAS: The State would rest at this time, Your Honor.

SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

TRANSCRIPT OF JURY INSTRUCTIONS

Guilt/Innocence Phase of First Trial,

State of Georgia v. Christopher A. Burger

Indictment No. 77-1641

January 23 and 24, 1978

[Transcript pages 403-414]

* * * *

CHARGE OF THE COURT

Ladies and gentlemen of the jury, the defendant, Christopher A. Burger, in this case, was indicted by a Grand Jury of Wayne County, Georgia at the November Term, 1977 of Wayne Superior Court. He is charged as follows:

"The Grand Jurors chosen and sworn for the County of Wayne, in the name and behalf of the citizens of Georgia, charge and accuse Christopher A. Burger and another named individual with the offense of murder for that the said Christopher A. Burger and another named individual on the 5th day of September in the year of our Lord, Nineteen Hundred and Seventy-seven, in the county aforesaid, did then and there unlawfully, wrongfully, feloniously, and with malice aforethought, kill and murder one Roger E. Honeycutt, a human being, drowning the said Roger E. Honeycutt, all of said act being contrary to the laws of said State, the good order, peace and dignity thereof."

I will tell you now that you will disregard the other named individual entirely, and consider the case as to Christopher A. Burger only.

I charge you that neither the language contained in this indictment nor its return by a Grand Jury of this County constitutes any proof as to the guilt of the accused, Charles A. Burger, in this case. He has entered a plea of not guilty, and I charge you that his plea of not guilty does note constitute any proof of his innocence in the case. The indictment, the language contained in the indictment, the charge contained in the indictment, and the plea of not guilty entered by the defendant do form the issue which you are to try and determine by your verdict.

I charge you that the defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial and until and unless the State shall introduce sufficient evidence in your presence and hearing to convince your minds beyond a reasonable doubt as to his guilt.

Now, a reasonable doubt, ladies and gentlemen, means just what it says. It is a doubt of a fair-minded, impartial juror, acting under the sanctity of your oath, honestly seeking the truth. It is not an arbitrary or a capricious doubt, but it is a doubt arising from a consideration of the evidence or from a lack of the evidence or from a conflict in the evidence. If, after considering all the facts and circumstances of this case, your minds are waivering, unsettled, and unsatisfied, then that is the doubt of the law and you should acquit this defendant. However, if that doubt does not exist in your minds as to his guilt, then you whould convict the defendant.

I charge you further, ladies and gentlemen, that you are the judges of both the law and the facts in criminal cases, and this is a criminal case. The law you take from the Court as given you in charge, and the facts you get from the witnesses who testified, and from the evidence

admitted as exhibits, State's Number "1" through whatever number were introduced.

I charge you further, ladies and gentlemen, that you are made the exclusive judges and the sole judges as to the credibility or believability of all the witnesses who appeared and testified in this case. And, in passing upon their credibility or believability, you may consider the witnesses' manner of testifying upon the witness stand, their interest or lack of interest, their means and opportunity for knowing about the facts to which they testified, their reasonableness or unreasonableness of their testimony, their prejudice or bias, if any should appear in the case, and you have the right to consider the personal credibility of the witnesses insofar as the same may legitimately appear upon the trial of this case.

Now, the Court did allow into evidence testimony by the Military CID special agents and by Deputy Sheriff Johnny Shuman relative to certain statements that may have been made by this defendant, Charles A. Burger—or Christopher A. Burger. And, before you consider this as evidence for any purpose you must first decide two questions.

First, was the defendant warned of his constitutional rights, and did he clearly understand and knowingly give up such rights? And second, was any statement he may have made, clearly made made voluntarily and freely?

The rights which must be explained and which must be understood and given by the defendant before any statement is taken by the police, military police or civilian police, are as follows:

That he, the defendant, Christopher A. Burger, had a right to remain silent.

That if he chose not to remain silent, anything he said or signed could be used as evidence against him in Court.

That he had a right to consult a lawyer before any questioning, and to have the lawyer present with him at all times during any questioning, and that if he did not have the money for a lawyer, a lawyer would be provided for him by the State, to represent him, before any questioning and to be present with him during any questioning.

To be admissible, any statement made by Christopher A. Burger must have been freely and voluntarily made, and willingly given, with complete understanding and without any threats or fears, or violence or injury, or even a suggestion of any promise of leniency or reward. A statement induced by the slightest hope of benefit or the remotest fear of injury is not voluntary. To be voluntary, a statement must be the product of a free will and not under compulsion or or any necessity imposed by others.

The burden of proof is upon the State to establish that the warning of all these rights mentioned to you were given, that they were clearly understood and knowingly given up by this defendant, and that the statement was voluntarily and freely and willingly made.

Now, if you find that all of the warnings as to his constitutional rights were given, that the defendant did clearly understand the meaning of what was said, and that he knowingly gave up such rights, and if you further find that any statement he may have made was freely and voluntarily made, then you will consider it as evidence, and you will apply the general rules for testing the believability of witnesses and decide what weight, if any, you give to any part of such evidence. However, if you fail to find any one of the conditions which I have just described to you, you must disregard the statement entirely and give it no consideration in reaching your verdict.

You should consider with great caution the evidence of any admission, statement or incriminatory statements made by this defendant. In weighing such evidence, you

should consider whether the statement was made by this defendant, whether it was truthful, whether it was accurately repeated by witnesses here before you, whether this defendant understood what was said, the circumstances under which it was made, the emotions of hope or fear that may have existed, if any.

You, the jury, may believe admissions or incriminatory statements in whole or in part, believing that which you find to be true, and rejecting that which you find to be untrue. Upon you alone rests the duty to apply the general rules for testing the believability of witnesses and to decide what weight should be given to all or any part of such evidence.

I charge you further, ladies and gentlemen, that in considering the evidence in this case and the testimony in the case, if you find there are conflicts in the evidence about material matters, it becomes your duty to reconcile such conflicts, if you can, without imputing perjury to any witness; the law presuming that all witnesses tell the truth until the contrary is made to appear from the evidence.

If, however, after an honest effort to reconcile such conflict, if you find there are conflicts, you still cannot do so, it then becomes your duty to believe that witness or those witnesses whom you think are most entitled to credit and belief.

Now, the object ofall legal investigation is the discovery of the truth. Direct evidence is that which points immediately to the question at issue. Indirect or circumstantial evidence is that which tends to establish the question at issue, by proof of various facts and circumstances sustaining by their consistency, the hypothesis claimed.

I charge you that moral and reasonable certainty is all that can be expected in a legal investigation. And, whether dependent upon direct or circumstantial evidence, the true question is not whether it be possible that the conclusion at which the evidence points may be

false, but whether the evidence, all of the evidence, is sufficient to satisfy your minds and your consciences beyond a reasonable doubt.

A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, under our law every person concerned in the commission of a crime is a party thereto, and may be charged with and convicted of the commission of the crime. A person is concerned in the commission of a crime only if he directly commits the crime, or intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime, either in fact or because of legal incapacity, or intentionally aids or abets in the commission of the crime, or intentionally advises, encourages, hires, counsels or procures another to commit the crime.

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted and punished for commission of the crime upon proof that the crime was committed, and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has not amenable to justice or has been acquitted.

In this case two defendants are named; that is, Christopher A. Burger and Thomas D. Stevens. You, ladies and gentlemen of this jury, are to concern yourselves only with the trial of this defendant, Christopher A. Burger. The other defendant is to be tried by other jurors at a different time.

Now, I further charge you that although a person may have been present at or near the scene of a crime, that if he did not in any way intentionally aid, abet, procure, or intentionally participate in the commission of said crime he would not be a party to said crime.

Now, by definition, ladies and gentlemen, in our State a crime is a violation of a statute of this State in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.

A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they accused is prosecuted.

A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provide[d] the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

The law permits certain witnesses who have had special training, knowledge and experience in certain lines, such as the doctor from the State Crime Lab and the finger-print expert, to give their opinions as experts, based upon their knowledge of particular matters. I charge you that the weight which is to be given the opinions of expert witnesses is for you to decide. You may

accept it and act on it, or you may reject it, and then act on your own judgment, as you apply it to the evidence in the case.

Now, the specific statute this defendant is charged with having violated at the time and place named in the indictment is that of murder. The definition of our law of murder is: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

A person also commits the crime of murder when in the commission of a felony, he causes the death of another human being, irrespective of malice.

I charge you that if you believe beyond a reasonable doubt that this defendant committed the crime as charged in this indictment, at any time prior to its return by the Wayne County Grand Jury, it would be your duty to convict him. In that event, the form of your verdict would be: "We, the jury, find the defendant guilty."

If you do not believe the defendant is guilty, or if you do not believe that he is a guilty beyond a reasonable doubt, it would be your duty to acquit him, or if there is a reasonable doubt in your mind as to his guilt, it would be your duty to acquit him. And, in that event, the form of your verdict would be: "We, the jury, find the defendant not guilty."

Before you go to your jury room, I do want you to understand that throughout this trial there have been many motions and objections, and statements by counsel for both sides, and by the Court. I emphasize to you that by no ruling which this Court has made during the progress of the trial before you has the Court intimated or expressed any opinion upon the facts of the case, upon

the credibility of the witnesses, upon the weight of the evidence, or upon the guilt or innocence of this defendant. By no portion of this charge has the Court intimated or expressed any opinion upon these matters, each and all of which belong exclusively to you jurors for your judgment and your determination.

The Court states the law. You find the facts. You apply the one to the other, and in that way you decide the outcome of the case.

Under our law you are made the sole judges of the facts of the case. You are the sole judges of the credibility of the witness. You are the sole judges of the weight of the evidence. You are the sole judges of the guilt or innocence of the prisoner at the bar.

Now, when you go to your jury room, ladies and gentlemen, the first thing you need to do is elect your foreman. Then once the bailiff or sheriff, or deputy sheriff brings to you this indictment, and all of the exhibits which were introduced to you, after you received that and after you have elected your foreman, you may begin your deliberations as to the verdict in the case.

Once you have agreed upon a verdict, let the bailiff stationed at your door know of that, and you will be brought back into the courtroom for publication of your verdict. Let your verdict be in one of the forms suggested to you by the Court to indicate your finding.

After all, since the beginning of the word itself, its very origin, the word "verdict" has always related to the word "truth". Therefore, let your verdict speak the truth. It must be unanimously agreed to by all of you, and it must be reduced to writing, and it should be written on the back side of the indictment at the very tip top of the page where it the printed words begin, "We, the jury, find the defendant blank", and there is a blank line there. Then it should be dated this date, signed by your foreman at the place indicated by the printed line, and the word under it, and then returned into open court.

I do repeat your verdict must be unanimous. The twelve of you in the jury box may retire to your jury room. And, the two of you who are alternate jurors may come out into the separate room where you were earlier.

You may retire.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

TRANSCRIPT OF THE TESTIMONY

Civil Action No. CV280-114

CHRISTOPHER A. BURGER

v.

WALTER ZANT, WARDEN

March 4, 1981

[Transcript pages 12-91]

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EXAMINATION OF MR. LEAPHART BY MR. FARMER:

Q. State your name, please?

A. Alvin Leaphart.

Q. And, are you engaged in the practice of law?

A. Yes, sir.

Q. And, what type of entity are you engaged in the practice of law? What type is it, a Professional Corporation?

A. Professional Corporation.

Q. And, where are you engaged in the practice of law?

A. Jesup, Georgia.

Q. And, what is the style of the Professional Corporation?

A. Gibbs, Leaphart and Smith, P.C.

Q. And, who are the people that are engaged in this corporation with you?

A. Me, and Robert B. Smith. My uncle was Warner Gibbs, and he is dead.

Q. But, primarily now it is you and Mr. Robert Smith?

A. Right. We have an associate Helen Herbler who works with us.

Q. And, is Robert Smith referred to as "Bob?" Is that—

A. Yes, sir.

Q. Is that the way you refer to him? Was this corporation association in business at the time of your representation of Mr. Christopher Burger?

A. Yes, sir.

Q. Did your association, corporation represent Mr. Burger?

A. I was appointed individually to represent Mr. Burger.

Q. All right, sir. And, were you also appointed to represent or some from your professional corporation also appointed to represent Mr. Stevens?

A. Robert Smith, my partner, for the use of no better term, was appointed.

Q. And, when were you appointed to represent Mr. Burger, and when was he appointed to represent Mr. Stevens?

A. I was appointed to represent Mr. Burger probably a couple of weeks after he was—I say a couple of weeks. It was sometime either a week or two weeks after he had been charged with the crime.

Q. Was any attorney representing him before you represented him?

A. Not that I know of.

Q. And, when was Mr. Smith appointed to represent Mr. Stevens?

A. He was appointed along about the same time, the exact date or whether he was appointed before me, or after me, I don't know. I can't tell you that.

Q. But, y'all were engaged in—the corporation was formed at that time, at all times that you represented both Mr. Stevens and Mr. Burger, is that correct?

A. That's correct.

Q. And, you did receive funds for representing Mr. Burger and Mr. Stevens, is that correct?

A. That's correct. I submitted my bill to the County and the check was issued to me. Robert, he submitted his to the County, and the check was issued to him.

Q. And, did those funds become part of the professional corporation?

A. Yes, they did. Deposited in our joint account.

Q. And, they were dispensed according to the terms of the corporation, is that correct?

A. We paid some bills with it.

Q. But, I mean,

A. That's correct.

Q. —they were divided as the corporate agreement is. And, what—

A. We don't have a corporate agreement. We're like shoemakers, I guess, you know, all the children go barefooted. I think we have a corporate agreement. Anyway, we spent the money that was—it went into our common fund, and we spent it. Where it went, I don't know.

Q. All right, but it went into the common fund of the corporation from both Mr. Stevens and from Mr. Burger.

A. That's right.

Q. And, did Mr. Smith work on Mr. Burger's case?

A. He helped me, yes.

Q. And, did you work on—Mr. Stevens case. Help him?

A. That's correct.

Q. And, y'all practice in the same office there in Jesup, is that right?

A. Yes.

Q. And, of course, you talked with Mr. Stevens and you talked with Mr. Burger also.

A. That's correct.

Q. —from the beginning.

A. That's right.

Q. And, at any time did—during the representation, did the Court—did the trial court inquire into or make any determination of whether there was any conflict of interest about the representation?

A. It was never brought up.

Q. All right.

A. We didn't feel that—as I told you before, I never had the gut feeling that there was ever any conflict.

Q. Did you ever mention anything about it to Mr. Burger or Mr. Stevens?

A. We never discussed any—we never discussed that.

Q. And, actually the first time that you were aware that anything was brought—the first time that you were aware about it was when Mr. Hill from the Attorney

General's office called you and told you it was in the petition in Federal Court—

MR. HILL: Your Honor, I want to object to leading questions.

THE COURT: All right, I'm not going to allow you to lead him, Mr. Farmer. I sustain the objection.

MR. FARMER: All right, sir.

Q. When was the first time you were aware that the conflict of interest had been raised?

A. I got a copy of the petition for writ of habeas corpus.

Q. Who sent you that copy?

A. I think Mr. Hill did.

Q. All right.

A. That's where I learned it.

Q. All right. And, did Mr. Hill call you about the appearing here today?

A. Yes, he did.

Q. Did he ask you to come?

A. Yes, sir.

Q. And, you are here pursuant with your agreement with him that you would come?

A. I think you asked me to come too. And, I told you—

Q. But, he had already asked you to come and you had already agreed to come?

A. Yes, sir.

Q. And, nothing was mentioned between you and Mr. Smith ever about a possible conflict of interest?

A. No, sir.

Q. There's been no research of any law about what might be—whether you might have a conflict of interest.

MR. HILL: Your Honor, again I would like to object to leading questions.

THE COURT: All right, Mr. Farmer—

Q. Did you research any law as to make the determination whether there was a conflict of interest?

A. Well, we never thought there was any, so you know, I have enough stuff to look up without hunting things to do. And, I didn't think about it, so I never looked up that particular subject.

Q. All right, sir, what is your understanding of what a conflict of interest is?

A. My understanding of a conflict of interest is basically what the definition of the word is. If you have in this instance, if you have a situation where you're restricted either in your own mind, or in some way going all out to represent an individual because of your relationship with another party involved in that action, or your relationship with some other party who—at all. Anything that would inhibit you either intellectually or as a practical matter from going all out to represent your client.

Q. Are you aware of any decisions by the Georgia Supreme Court about conflict of interest in death penalty cases?

A. I have not read any decisions. I understand—I think you mentioned that there was a decision but I have not read it.

Q. Do you think there is any difference in conflict of representation in death cases than in other cases?

A. I think if you've got a conflict, you've got a conflict. I think if you've got a conflict representing a guy for shoplifting you've got a conflict. It's the same thing as far as I'm concerned. I don't know what the decision says. But, that's the way I feel about it.

Q. Do you think there is more of an opportunity for a conflict in a death case than in a regular case?

A. No.

Q. In—

A. You might point out something that I may not have thought about. But, I don't know of any.

Q. But, I mean, as you sit there now, you don't think of anything?

A. No.

Q. What was the theory of defense in this case? What was the defense to be in this case?

A. Well, of course, my theory of defense was of course trying to make the District Attorney prove his case. And, my theory of defense was to—well, that in effect, in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.

Q. What about in the Tom Stevens case?

A. Same thing, I guess. I did not try the Tom Stevens case. I worked then with—discussed the issues with Bob. We researched the law together. But, in the actual trial of that case I was not involved in it, at either time. He sat in with me in the trial of Burger's case, and helped me. But, I never was involved in his as far as the trial is concerned.

Q. Is there a difference in personalities in you and Mr. Smith, and the expertise? And, if there is, would you describe those differences?

MR. HILL: Your Honor, I would like to pose an objection. I fail to see how that is relevant to his representation of Burger, Mr. Smith's personality. I just don't see the relevancy of it.

THE COURT: I don't know what it is. But, I'm not going to sustain an objection. I might after he starts into it. You may answer.

A. All right. Basically, of course, my partner and I are two different personalities. He's—he went to engineering school and I went to Art school. So, that—and both of us ended up in law school. And, he is a very meticulous engineer type, one, two, three, four, five. And I'm not—I don't go that way. I go from one to four and hope two and three don't show up sometime. I mean, that is just the basic difference in our personality. And, as a practical matter, our—we feel our personalities blend and makes us good partners.

Q. So, there are extra areas in which you have understanding and knowledge and he does not, and vice versa, is that—

MR. HILL: Your Honor, that's—I object. That's not what the witness testified.

THE COURT: The witness will explain.

A. That's not what I meant. I'm only talking about the basic difference in our personalities and the way we approach things. That's all I meant.

Q. Well, does that affect your practice of law?

A. Well, I'm sure that any difference in personality affects a person's approach to things.

THE COURT: Well, make the point, Mr. Farmer. I think every personality is unique. But, how does this relate to this case?

Q. It was a help to this case to have Mr. Smith help you, is that correct?

A. Yes, sir.

Q. Because he has a different view about things than you do in some ways.

A. That's right.

Q. So, it would definitely be an advantage to have your partner assist you?

A. I think it is always an advantage to have anybody assist you that knows anything about a particular subject.

Q. Now, in the trial of this case of what you tried to convince the jury, if I understand correctly, is that you tried to convince the jury that Mr. Burger was less culpable than Mr. Stevens, is that correct?

A. Yes, sir.

Q. And, the evidence supported that?

A. I thought it did.

Q. And, in doing this, I think you brought your file—

A. Yes, sir, it is on that front row, if you—

Q. May I hand you—

A. Yes, sir.

Q. Now, what are the ways that you felt there was a difference in culpability between Mr. Burger and Mr. Stevens?

A. I used an exhibit in Court in my final argument to the jury this is not the same exhibit but this is one I took to Court, and for some reason the Judge would not let me use this particular one. So, I laid it on the counsel table and put a blank sheet of paper up there and promptly copied it. So, this is the same thing.

Q. Does this refresh your memory as to the paper that you used in your argument to the jury?

A. Yes, sir, this is a duplicate of the exhibit that I used to the jury to explain my argument.

Q. All right, sir, let me ask to have this identified.

THE CLERK: It would be plaintiff's exhibit number 1.

Q. I show you this document marked for the purpose of identification Plaintiff's exhibit number 1. And, ask have—I might ask Mr. Hill—have you had an opportunity to see this?

MR. HILL: I've had an opportunity to see it.

MR. FARMER: Okay. Let me ask you this, is there any objection to having it admitted into evidence? I move to have it admitted into evidence.

MR. HILL: I don't have any objection.

THE COURT: Received.

Q. Yes. Now, the question is does that refresh your recollection as to the difference in culpability between Mr. Burger and Mr. Stevens?

A. This is just at the time that I—yes. Yes, sir.

Q. All right. What is the difference in the degree of culpability between the two people that were indicted together?

A. Well, in my approach to the jury, I prepared this exhibit and as you see one is entitled Stevens, and everything under this is what Stevens did. And, one is entitled Burger, and everything under there is what Burger did. And, each one reflects the ages. The ages of each are reflected.

Q. So, the first thing that is shown is that Mr. Burger is the youngest person?

A. Yes, sir, he was 17 as compared to 20.

Q. And, that is a difference of culpability?

A. One of the differences, yes.

Q. All right, and what else?

A. Then the participation of each in the crime, alleged crime, and the sequence of events that the—that it occurred, as they occurred.

Q. All right, sir, would you explain those to us?

A. All right. The first thing that happened was there were two weapons initially used in the kidnapping of the cab driver, which was stolen from—supposedly stolen from the Ft. Stewart—one of the kitchens at Ft. Stewart. One was a long—a rather large knife sharpener, about—I think it was over a foot long, and then a large butcher knife. And, Stevens, had the sharpener and Burger had the knife. And the evidence was that Stevens had sort of planned this situation. And, told Burger what he was—what to do. And, so the first thing that happened that Stevens was to put the knife sharpener on the Cab driver's throat. Which he did. Then, Burger stuck the knife in his side. They were both in the back seat, as I recall, and Stevens had it around his throat, pulling him back over the seat. And, Burger put the knife in his side. In that—that portion of it was to show that Stevens initiated the whole thing and that Burger was merely following his instructions. The—then I have a list of things that Stevens allegedly did which constituted the—I felt the aggravating circumstances in the case which should be attributed to Stevens rather than Burger. One was that Stevens made the driver get out of the cab. Stevens was the one that robbed him, made him undress, made him commit oral sodomy and committed anal sodomy. Then tied him up. Then told him to get in the trunk, then stated to Burger they had to kill him. And, Burger stated that he didn't want to kill him. And, then, Burger told Stevens to drive the car to this pond. All

this took a period of a number of hours. And, then Burger followed his instructions and drove it to the pond. And, then Stevens stated that they must get rid of the car, they must wipe off the fingerprints, and must put the car in the pond. And, at that instance, Burger put the car in gear and it went into the pond.

Q. Now, as to the personalities of the two individuals, Mr. Stevens and Mr. Burger, was there also a difference in the amount of leadership ability, or the amount of ability to follow between these two individuals. Which one was—

A. Well, Stevens appeared to be the leader.

Q. And, did Chris Burger then appear to be a follower type?

A. Yes.

Q. Now, was there a strong legal issue in the case about the statements that had been made by Mr. Burger and by Mr. Stevens to the officers?

A. You mean on the admissibility of alleged confessions?

Q. Yes.

A. Yes.

Q. And, would you explain briefly that situation about the confessions?

A. Well, Burger was originally picked up by the CID, the Army police. And, carried—say at 6:30 in the evening. He was carried to—he was in custody from 6:30 and the evidence that I saw that he was under constant interrogation from 6:30 on until he signed a confession about sometime in the morning, I don't know, maybe around 3:00 in the morning, or four. And, during that time that Burger was advised that he had a right to a military lawyer free of charge and a civilian lawyer—or a civilian lawyer if he wanted to pay for him. And, that was the only advice that he got concerning an attorney up then until the time that he carried them, the police, to the pond where the car was run into the pond and showed them where, you know, where it

was. And, then after that he got in the—after all that, then the Sheriff's department tried to—or did read him his *Miranda* rights, you know, which is more full.

Q. But, this was a legal issue in both Mr. Stevens case and in Mr. Burger's case?

A. That's correct.

Q. And, there was a question as to whether that could be used both by—it was a very serious question as to whether that could be used by the State in the State's mind and in your mind, also?

MR. HILL: Your Honor, I'm going to object. I don't think that this witness can testify as to what was in the District Attorney's mind. And, also I realize we don't have a jury here, but I would appreciate it if Mr. Farmer wouldn't editorialize. I don't know what a strong legal arguments—

THE COURT: Well, I think you are going outside of the bounds of proper examination, Mr. Farmer. I sustain the objection.

MR. FARMER: All right.

Q. In your opinion, was this a—an issue of great significance in this particular case?

A. I thought it was based on the fact that I had a psychologist examine Mr. Burger, and he determined that he had an 82 I.Q. based on the Wexler (phonetic) I.Q. test.

Q. Was there also another issue of venue, or location of the crime that appeared to be a strong issue in the case?

A. Initially we took the position that the jurisdiction of the case was with the Army because of the fact that all three persons involved were Army personnel; that the crime was initiated on the Ft. Stewart Army reservation; and all of the robbery, kidnapping, sodomy, and the other abuses all took place on the military reservation itself and that the fact that the—it ended up in the pond was just the end of the sentence, so to speak. And, we felt that our original position was that since they were all

three military personnel that the Army had jurisdiction and the civil authorities did not. Of course, some of the cases say I was wrong, but that was our position anyway.

Q. But, there were constitutional limitations that may have, in your opinion, that may have restricted the State from getting certainly a death sentence against Mr. Burger and Mr. Stevens, is that correct?

A. Well, I felt that the State didn't, shouldn't have tried the case. I felt that the State did not have jurisdiction. That was my position as far as that was concerned.

Q. Now—

A. That's a legal question.

Q. Sure. Now, if you had not represented, your corporation had not represented Mr. Stevens, Mr. Smith could have helped in your representation of Mr. Burger also, couldn't he have?

MR. HILL: Your Honor, I want to object. That's a hypothetical. I think he ought to question him on the facts of this case. And, for another thing, I think that question is a little unclear. I didn't really understand it myself.

MR. FARMER: I'll reframe the question, withdraw it and reframe it. There's no reason that if the Court had not appointed Mr. Smith to represent Mr. Stevens, that he wouldn't have helped you represent Mr. Burger, is there?

A. Yes, because of the fact that he would have been doing other things. I mean, we wouldn't have—I would have handled—I would have handled Burger's case without any help to amount to anything from Bob. But, I would probably, you know, like anything else, I would have talked to him about it.

Q. He would have consulted, if he had been paid by the State, he would have consulted with you, there was no—wouldn't he have?

THE COURT: I'm not sure I understand the question.

Q. All right.

THE COURT: I understand the situation, what Mr. Leaphart is saying is that if he had not—if Smith had not been employed by the State then they could not have afforded to have used him on the Burger case because he would have needed to have been devoting his duties to other remunerative activities, is that what you are saying?

A. Yes, sir.

Q. He would have been of assistance in helping you, though?

A. If I had called on him. Probably would.

Q. But, it would have benefited you to have had his assistance?

A. I think it benefits anybody to have assistance.

Q. All right, sir. Now, what did the corporation receive in payment from the State for representing Mr. Burger?

A. I forgot.

THE COURT: What relevance does that have, Mr. Farmer?

MR. FRAMER: Your Honor, I think the relevancy is that it shows the facts as I understand it were that they were paid $9,000 for representing Mr. Burger, and $9,000 for representing Mr. Stevens. I think if the corporation is going to receive $18,000 that is a substantial amount of income that could cloud one's opinion as to a conflict of interest. And, I think that—

THE COURT: I don't—I'll let you develop it. I'm not sure that you draw the proper conclusion, or that I understand the conclusion.

MR. FARMER: All right, sir.

Q. Are those figures—

A. I think that's about right. I can't remember exactly, but that sounds about right.

Q. Now,

A. Whatever the records show.

Q. $9,000 for Mr. Burger and an additional $9,000 for Mr. Stevens.

A. I don't know. That's about right. Maybe—I don't know if it was exactly, I don't think it was exact.

Q. Might have been two or three hundred dollars over or under either way?

MR. HILL: Your Honor, I object, he's already testified he doesn't remember. If Mr. Farmer's got some document that reflects what he was paid, I think he should put that into evidence.

THE COURT: I agree. Sustain the objection.

Q. Could you go through your file and get your payment sheets out so we can introduce them into evidence?

A. I don't think they are in here.

PAUSE.

A. I don't think I have them. I think they are part of the record, if you've got a copy of the record. I think I furnished you with a—

THE COURT: Well, let's go ahead, you can get one of your people—

MR. FARMER: All right, yes.

THE COURT: —that shouldn't take but a moment to identify that.

MR. FARMER: All right, sir.

Q. But, you were given substantial payment by the State to represent Mr. Burger and the

MR. HILL: Objection to the leading question, Your Honor, he hasn't testified that he got a substantial payment.

THE COURT: Objection sustained.

Q. Were you given a substantial payment—

THE COURT: Well, he said he was given $9,000 or thereabouts. Let's go on.

MR. FARMER: All right, sir.

THE COURT: I don't suppose he would say "given." Paid.

Q. How many fees in the last four years have you received, your professional corporation received from the representation of any individual in one case that exceeded $9,000?

MR. HILL: Your Honor, I want to pose an objection. I don't see how that is relevant, to the representation in support of Mr. Burger.

THE COURT: I don't see, but I'm going to allow him to answer it, and then we are going to get out of this line of questioning.

A. How many years?

Q. Since the time that you have been representing Mr. Burger.

A. We've received a lot of them to be honest with you. We've received—we received last year, we received a—one fee of about $75,000 and another one of about $50,000 and another one of about $33,000 or $34,000 and a few in the range of $10,000. And, prior to that it was about the same thing. We do a lot of tort work. And, we've been fortunate in the last several years.

Q. Have any of them been for representations of people accused of crimes?

A. I haven't received a $9,000 fee for representing anybody for a crime. I've received a few $1,000 and $2,500 and $500 and what you can get.

Q. But, neither has the corporation received that large a fee for representing anybody in a criminal case?

A. No.

THE COURT: Let's go ahead, Mr. Farmer.

MR. FARMER: All right, sir. What training, or what expertise in the criminal law area as far as death penalty cases have you had or participated in since the time you were in law school?

A. I can't—about ten or twelve.

Q. And, where were they and what time?

A. They were in Wayne County, Jeff Davis County, Long County.

Q. These are cases of people you represented?

A. That's right.

Q. The question I was asking you was have you had any continuing legal education training in the area of criminal law?

A. I've attended a few seminars off and on, but no real—nothing that would make me hold my designate as a criminal lawyer. I'm designated in personal injuries and general trial.

Q. And, have you ever represented anyone in a death case before Mr. Burger?

A. Yes.

Q. Have you ever represented anyone since under the statute that was held facially constitutional in *Gregg*, have you ever represented anyone since then other than Mr. Burger?

A. Which case—is that the one concerning the constitutionality on the grounds—on the death sentence, is that what you are talking about?

Q. Since *Gregg v. Georgia*, have you represented anyone—do you—

A. I don't—I don't remember cases by name, as such. I remember things by principle. You know, I never studied that way.

Q. Are you familiar with the case of *Gregg v. Georgia*?

A. I think so.

Q. What do you—

A. Well, what is it? Is it the one concerning the last—whether or not the last ground or basis for the death penalty was constitutional? Which one was that? I don't know.

MR. HILL: This is not really in the form of an objection, but I think if Mr. Farmer will just give him a date—

MR. FARMER: Well, I—

THE COURT: Wait a minute.

MR. HILL: I think if Mr. Farmer will just give him a date and say have you represented anybody charged with death penalty since that date he could get at what he wants.

THE COURT: I think that would be too.

Q. Okay. Have you represented anyone charged with the death penalty since 1972?

A. Yes.

Q. And, since that time of representing people, have you read Supreme Court of the United States cases about death penalty case work?

A. Yes, sir.

Q. What is your understanding of the law since 1972 as far as death penalty cases?

THE COURT: Now, Mr. Farmer, I'm not going to allow you to give him a bar exam. And, I don't know why this is relevant. So, I'm going to—on my own motion ask you to make your thrust more precisely, or somewhere else.

MR. FARMER: All right, sir.

Q. Are you familiar with the holding in the case in which the Georgia death penalty statute was held facially unconstitutional?

A. Yes.

Q. And,

A. Then it was reenacted.

Q. Yes. What specifically was the holding of the Court in that case?

MR. HILL: Your Honor—

A. I don't remember.

MR. HILL (cont'd): I object. I don't think that is relevant.

THE COURT: I sustain the objection.

MR. FARMER: Your Honor, I would like to make an offer of proof on that to show that—

THE COURT: He said he doesn't know.

MR. FARMER (con't): All right, sir.

Q. Any case since then—

A. Your Honor, I don't want to say I don't know, because I think I've read the thing. But, I can't remember it.

Q. Are you familiar with any United States Supreme Court cases since that time dealing with constitutionality or dealing with any aspect of the procedure of the Georgia death penalty statute, or other death penalty statutes in the United States?

A. Yes, but I can't recite them to you.

Q. All right. Can you give me the name of any case—

MR. HILL: Your Honor, I want to impose an objection. I think the Court has instructed Mr. Farmer either to be more specific or to move on. And, all he is doing is giving a bar exam, like the Court has already ascertained.

THE COURT: All right. I reinvoke my ruling.

MR. FARMER: All right, sir, we would like to make an offer of proof, Your Honor, on this issue.

THE COURT: I'm not going to accept it now. I want to—I think that the question that needs to be—is not whether he-he has all the expertise in the world and is able to give a littany of recent Supreme Court cases, but whether in this case he exercised that standard of care for his client that is required. And, I do not see that the name of cases and all has anything to do with that. So, I'm not going to accept a proffer of proof along that line.

MR. FARMER: All right.

Q. What issues did you perceive to be determined by the jury in this case of Mr. Burger's? What issues were for the jury to make decisions on?

A. Of course, the basic issue was guilt or innocence.

Q. Were there any other issues for the jury to determine?

A. Well, of course, punishment.

Q. And, what criteria would be used in determining punishment?

A. You mean the statute?

Q. Yes, what would be the scope of the proceedings to make those determinations?

A. I don't understand what you are getting at.

Q. Okay. In determining guilt or innocence, what was the jury—what would be admitted before the jury to make that determination?

A. Would be admitted?

Q. Yes, what evidence could the jury legally hear to make determination of whether a person was guilty or innocent?

A. Of murder?

Q. Yes, of the crime that he was charged with.

A. Well, whatever the whole spectrum of the evidence was that was finally admitted.

Q. And, what could be produced by an individual to defend against the evidence that the whole spectrum of the evidence as you call it to show not guilty?

MR. HILL: Your Honor, I want to object. I think that is irrelevant, overly broad. If he wants to ask him questions about—

THE COURT: I agree.

MR. HILL: —this case, then we can move on.

THE COURT: We are talking about this case, Mr. Farmer, and not about what theoretically is possible. I think what you are getting at is what defense and what was available and what did he try to do. Isn't that right?

Q. What was available to be done after he was found guilty?

A. What was available to be done?

Q. Yes, as far as sentencing is concerned?

A. Well, go into the aggravating and mitigating circumstances.

Q. All right. And, what would be the scope of the evidence that could be presented on those issues?

A. Well, of course, it is unlimited as to what you can present. Are you talking about in this particular case?

Q. Yes, I'm talking about in this particular case.

A. It was my judgment at that time that the best approach was the one I took, to argue the difference in their ages, the difference in their participation in the crime.

Q. So age was the relevant issue to have before the jury, participation of degree of leader and following that you have already mentioned, would that be an important issue?

A. Yes, sir.

Q. Issues about what other issues, all the issues you mentioned to us on that chart awhile ago with all the evidence to support all of those issues be important.

A. Yes, sir.

Q. What about other issues dealing with the background of the individual?

A. I elected not to go into the individual into his background, because I felt that by doing so that the end result would be to—would not be to his benefit.

THE COURT: Why?

A. Because of the fact that he had a—he had been involved in a beating and a number of things that indicated violence and stuff at an earlier—

THE COURT: Did you review all of this with the client and with his family, or anyone, people who were interested in him about not exposing this area to the scrutiny of the jury.

A. Yes, sir, I did. I discussed this with him and with his—as I recall, with his mother.

Q. Did you, on page 217 in the transcript it says and this is during the penalty phase of the second trial, on page 217. There is the statement from the Court: "My question I am going to address, are you putting his character in here for the purpose of consideration of the jury," and you say, "no, sir." When you were trying to establish a point with the Court earlier on page 216 the Court asked you: "Are you putting his character in issue?" You say; "no, sir." The Court responds: "You

are getting on the verge of doing so. I will allow this line of questioning to be pursued if it is not your intention to get into that area. What is your purpose." Were you trying to keep his character out of issue?

A. That's right.

Q. And, was it your opinion that if you showed things during this penalty phase of the trial that you would be putting his character in issue?

A. I felt that certain aspects of his character, yes.

Q. Did you ever investigate anything about the background in Indianapolis?

A. I had some reports from psychologists in Indianapolis.

Q. When is the first time you talked to any of his family?

A. Whenever they came to town.

Q. Did you call and tell them about the trial?

A. No, I don't think I did.

Q. Well, the time that the trial was going to happen the first time, you had talked to the family before the—before the supposed—

A. I can't remember. I think I talked with his mother, at some point in time.

Q. Before that.

A. Before the trial?

Q. Before she came to town. You had talked to her.

A. I may have talked to her on the phone. I can't remember.

Q. Did you ask her anything about his background?

A. Yes, I think we discussed it.

Q. Did you explain to her what the penalty phase of the trial was about, and what evidence could be presented then?

A. I don't think I went into that with her.

Q. Did you explain to any member of his family?

A. She was the only member of the family that I remember being involved with.

Q. Did you explain it to Mr. Burger?

A. Yes.

Q. And, what did you explain to him that could be put into evidence?

A. Well, as I recall, anything that would mitigate the circumstances, anything good about him, anything—of course, it was my understanding that that is very broad. That you can generally put up anything you can find that is good about anybody in mitigation of the sentence.

Q. Did you investigate or talk to anybody other than read those reports that his mother brought you, the psychological reports—

A. I—excuse me.

Q. Did you talk to anybody about what they might be able to show about his background?

A. Yes. Of course, we investigated the case and Burger's background, and—

Q. What investigation did you do?

A. Well, talked to the witnesses. Talked to the police officers. Talked to the CID people. Talked to Burger's mother, talked to Burger. Talked to Stevens.

Q. How many times did you talk to Mr. Burger before the trial and for what period of time?

A. I can't remember that. I don't know. A number of times.

Q. How long is the longest time you ever talked to him?

A. Probably about an hour.

Q. On how many occasions?

A. I can't remember that. About maybe a half a dozen times.

Q. And, who other than his mother when she came to town did you talk to?

A. I think that was all I talked to, his mother. You know, in his family.

Q. Did you make any attempt to talk to the other people that he had lived with during his life?

A. I couldn't—didn't know who they were. I knew that he had been in wherever he had come from to go in the Army. He had been—he had lived there. And,

then his mother and father had separated at an early age as I recall. He was down in Florida for a while. Had gotten in some trouble down in Florida and then he went back up North where he lived and got in some trouble up there. And, then he ended up in the Army. And, very basically, I couldn't find anything in Mr. Burger's background which I felt would be helpful. You know, I could have put his mother up, I'm sure. And, she could have said some nice things about him. But, my feeling was that a lukewarm witness would have without any real thing to say would have possibly been harmful. And, I felt—I just decided not to do it.

Q. You decided that after the first trial didn't go right? You tried it twice, didn't you?

A. Yes.

Q. And, after it didn't work that way the first time, you decided the second time you would go the same way you did the first time?

A. I don't know that I tried it exactly the same way the second time.

THE COURT: Marshal, let's take a short recess.

NOTE: RECESS

RECONVENED

THE COURT: Let's continue, Mr. Farmer.

MR. FARMER: Yes, sir.

EXAMINATION OF MR. LEAPHART CONTINUED:

Q. Mr. Leaphart, did at any time during the representation did you talk to the District Attorney about the possibility of Mr. Leaphart (sic) testifying against Mr. Stevens?

A. You mean Mr. Burger?

Q. Mr. Burger, excuse me.

A. No.

Q. There was no discussion of his testimony in exchange for a lighter sentence for Mr. Burger?

A. No, sir.

Q. Did—with the issue, one of the central issues, or key issues being in the case the degree, the difference in culpability of the two parties, did you make issue of this in your briefs to the Georgia Supreme Court?

A. I can't remember whether I did or not. I may have. I don't know. Whatever is in the brief. I believe I have it here somewhere.

THE COURT: I'm sure it is part of the record in the case.

MR. FARMER: If it isn't, we will make it part. I don't believe Mr. Hill has—

MR. HILL: I have not it as an exhibit—

MR. FARMER: We will leave the record open to permit that.

A. I believe I sent you copies. Haven't I sent—I know that when I sent the record to—what is the lady's name, Patsy—

Q. Mrs. Morris.

A. Patsy Morris, that I thought I included copies of all my briefs.

MR. FARMER: We will include those in the record.

Q. It is an issue that should be or should have been before the Georgia Supreme Court?

MR. HILL: Your Honor, I object to the leading questions.

Q. Is it an issue that should have been before the Georgia Supreme Court?

A. I didn't think so. I don't think so.

Q. Why not?

A. On the basis of a jury decision on the—I felt that was a jury decision based on the evidence that, you know, at that particular time.

Q. That the decision of the jury had insulated the Georgia Supreme Court from—

A. No. The issue—I don't think there was any evidence—I don't think the point that—I don't think—of course, that's a legal conclusion. I don't think that point could have been raised on appeal based on that set of

circumstances. As I recall them. What is in the brief—I haven't read the brief lately. I've scanned it, but I haven't read it in depth.

Q. Do you think it is a point—I'm asking you—do you think it is a point that could have been there legally, could you have included that as a matter of law?

A. I think you can always include most any question for the Supreme Court to pass on. Whether they will pass on it or not is up to them.

Q. And, under what theory would you have included that, or do you think it could be included?

A. Well, the only theory would be the lack of evidence to sustain the finding of the jury as to the—what punishment to give. Sufficiency of the evidence would be the only way I could see to raise that issue.

Q. Did you work on the brief in both the Stevens case and the Burger case?

A. Yes, sir.

Q. And, did Mr. Smith work on the briefs in both Stevens and Burger?

A. We collaborated. But I primarily prepared the briefs in both cases on the second appeal. I forget which one of us—the first appeal I forget which one of us primarily worked on those.

Q. Did you at any time make a motion for change of venue in this case?

A. No, sir.

Q. Was there high feelings, adverse feelings in the community about this particular case?

A. Everybody knew about it. It was a well publicized event. The—I don't think it was what you call, —when you talk to me about high feelings, I think somebody is going down and breaking in the jailhouse and trying to lynch somebody. Everybody knew about it. I say "everybody." It was widely known, and people were generally appalled by such a thing having occurred, if it had occurred. I don't think there was any prejudgment on the part of anyone. Always is. But, the majority of the citizens had not, in my opinion, prejudged the situation.

Q. Was there any matter of strategy the reason you didn't file the motion for change of venue?

A. Yes, I felt that the motion for change of venue I didn't think I had the evidence. I couldn't find anyone to prove that—to the effect that he could not have a fair trial in Wayne County. I felt that to file a motion for change of venue would probably--well, I know it would be reported. And, the jury that was finally selected it might have affected them adversely, and I didn't think there was any merit in that.

Q. Was there anyway that you knew or now know that you could have kept that from being reported and become—have an adverse effect?

A. I don't think in a place like Jesup, Georgia, which is a county of—within a county of 17,000 people—seventeen to twenty-one thousand people—that any order of any Court holding down things of that nature would be—well, in any small town that it would have been effective. And, for that reason—you can do all this stuff in Atlanta, and get by with it, as far as the general public is concerned. You may can get by with it in Savannah. But, you can't—you've got to be careful how you handle these things in a small town because of that. Everybody knows what everybody is doing, generally.

Q. And, so you knew of no way that you could keep it from being known?

A. I knew of no effective way I could do it.

Q. Did you consider between the first and second trial did you file for a change of venue?

A. No. You mean did I consider it?

Q. Yes.

A. Or did I file?

Q. Did you file one?

A. No.

Q. And, was there publicity between the first and second trial?

A. It was reported. There were several newspaper accounts of the trial.

Q. Were the people aware of the sentence he had received in the first trial?

A. I'm sure they were.

Q. Were they aware of the evidence that had been presented in the first trial?

A. When you say the people, are you talking about the general public?

Q. Potential jurors, yes.

A. I'm sure some of them knew. I don't think that that was such a—that was as widespread, or something that wasn't widely known.

Q. Did the media report the reversal of the case?

A. As I recall they did. I'm not trying to evade your question, I just—I think they did.

Q. And, it was general knowledge in the community that the people were being tried again for something they had already been convicted of and something they had already been given the death sentence for?

MR. HILL: Your Honor, I want to object to the leading question.

Q. Was there general knowledge in the community that they were being tried for something that they had already been convicted and sentenced to death for?

A. I think it was general knowledge that these two were being retried. We were going to have a new trial involving these two people. What the issues were, I don't think was general knowledge.

Q. What preparation did you do between the first trial and death sentence and the reversal of that, and the new trial? What investigation of potential witnesses for the new trial did you do?

A. I reviewed what I had and just generally reassessed the situation and chose to go like we did.

Q. Did you go see and interview any witnesses?

A. I didn't know of any witnesses other than what I had already had.

Q. Did you interview any witnesses other than on the witnesses for the State, the State's list of witnesses, or potential witnesses?

A. I interviewed, I had, of course, the psychologist that I interviewed and discussed the case with. And, of course, discussed it with his mother. As far as going out and trying to find any additional witnesses, which would help him in the sentencing stage, I did not have any knowledge of any witnesses that—potential witnesses that I thought would have benefitted him. Had I known or had knowledge of any, I would—certainly would have used them.

Q. Did you ask his mother at any time did she know anybody that knew anything about his background?

A. Yes, I know that I did because that's where I got a couple of reports on his—couple of psychologicals.

Q. Did you go see anybody and talk to anybody other than her, then?

A. I talked to a lawyer who she knows, from Burger's —that—Mr. Burger had lived. And, who had known the family. And, I was not given any information by him that helped.

Q. Did you ask him for any information and what information did you ask him for?

A. I asked him for general information. Mr. Burger's mother can probably tell you the name. But, I can't remember.

Q. Did he offer to assist you in—and did you ask him if he would testify for Mr. Burger?

A. He and I discussed the idea of Mr. Burger's history, and he and I both felt under the circumstances that possibly it was best that we not.

Q. Why?

A. Well, this particular lawyer was black. And, I felt that his close association with Mrs.—I didn't know what the association was, I'm not trying to imply there was—I felt that that would have had in the environment there, would have had an ill effect on Mr. Burger's chances.

Q. Explain what you mean then by that?

A. I think that it could have aroused some prejudice that should not have entered into the case. That was a decision on my part and his part not to participate.

Q. Purely because he was black?

A. Purely because of the—I guess you would say that. Both of us felt that it was a danger that we need not chance.

Q. Did you make any determination as to the percent of black people that were in the jury rolls, or in the jury box, the entire box. Did you investigate to see what percent of black people were in the jury box?

A. No, sir.

Q. Did you investigate to see what percent of women were in the entire jury box?

A. No, sir.

Q. Did you investigate to see what percent of young people were in the entire jury box, or panel?

A. No, sir, I did not.

Q. Did anyone do this for you, or do you—it wasn't done in this case?

A. It wasn't done. I knew that roughly probably about a little over fifty percent men, and forty something percent women. And, whatever, maybe about ten percent black, in the jury box. That's what it was and based on my experience that's what it is.

Q. But, you just—you have never checked to see.

A. I know based on experience what it is.

Q. What experience.

A. Trying cases in Wayne County for about 18 years. I know what shows up down there on—when they call a jury.

Q. And, do you know what percent of black people are in the county?

A. About 10 or 12 percent.

Q. And, do you know what percent of young people between 18 and 30 are in the county?

A. No, I don't.

Q. Do you know how, or have you ever investigated from your personal knowledge how the jury is drawn there, how the potential jurors are drawn?

A. Drawn out of a jury box.

Q. Do you know who the jury commissioners are?

A. I can't tell you right off hand who they are.

Q. Have you ever in your 18 years, and I guess sometime in the 18 years there were no black people on the jury, isn't that right?

A. I don't think that's right.

Q. Have you ever talked to any of the jury commissioners to find out how they did compose the box?

A. I've talked to several of them at times.

Q. The box that Mr. Burger's jury was drawn from, did you talk to anybody about that?

A. No.

Q. Do you know—were there any request for charges to the jury in the first trial? Did you prepare any written request to charges to the jury in the first trial?

A. No, sir.

Q. Did you give the Court any oral request for charges in the first trial?

A. I say no, sir. Whatever is in the record. I don't think I did, what the record reflects—but I don't—I don't recall.

Q. Did you brief any issues to the Court in the first trial?

A. In what respect?

Q. In any respect about any legal issue did you brief any issues to the Court?

A. You mean did I submit a brief to the Court on any of the legal issues?

Q. Yes.

A. No, I didn't. Not as I recall.

Q. Did you submit a brief to the Court on the motion for new trial?

A. Was a motion for new trial filed, or was it a straight notice of appeal? I don't remember. I didn't—

if there was one filed I didn't submit a brief because I knew it wouldn't be granted.

Q. Did you raise the issue to the Georgia Supreme Court that they reversed the case on, did you raise that issue in the first trial, did you raise that issue to the Court, or did they do it sua sponte?

A. I think we raised the issues.

Q. In the second trial, did you submit any request to charge to the Court?

A. No.

Q. Did the Supreme Court of Georgia make—did it fail to decide any issue because—or—there was no request to charge before it?

A. Yes, they did. The Court did not charge the definition of kidnapping, or the definitions of various crimes involved in the case nor did it give any instructions at all as to what type of evidence or the various tools the jury could use in deciding the weight and sufficiency of the evidence. We took the position that we didn't have to do that. And, I didn't want them to. I didn't want them to instruct on—

Q. On sufficiency of the evidence.

A. As a matter—I didn't want to tell the Court, didn't want to be in a position of reminding the Court of something that they may have forgotten, which would give me a shot on appeal.

Q. You didn't think it was any benefit to the jurors to—

MR. HILL: Your Honor, I object. I think he should let the witness finish answering the question.

THE COURT: Go ahead and finish the answer.

A. I felt, my reasoning for not filing any request to charge was that I was the—I was the defendant. I was—I don't have to object to the Court's charge in a criminal case, as you do in a civilcase. I did not want to help the Court as I saw it have an errorless trial. And, I felt that that issue was something that was—that did not have to be raised on—request to charge. And, I felt

that a request to charge on those issues and if the Court followed my request to charge we'd be here today and not trying the case down there, would not have made any difference. I was traveling on a technical, what I felt was a technical error of the Court that should have reversed it.

Q. You don't think for the jury to know how to evaluate the evidence makes any difference?

MR. HILL: Objection to the leading question.

THE COURT: Objection sustained.

Q. Do you think it makes any difference for the jury to know how to evaluate the evidence?

A As a practical matter?

Q. As a matter of—

A. As a legal matter it does. As a practical matter, I wonder how much they pay attention to those things I think the jury generally decides the case on what it wants to, other than what is told a man.

Q. And, you don't think the charge makes any difference to the jury?

A. I think the charges that are given in the Superior Courts of our State, I think, tend to confuse the jury more than it does enlighten them.

That's my opinion.

Q. Did you discuss with Mr. Burger not giving them any request to charge?

A. No, sir.

Q. Did you discuss with him anything about the change of venue?

A. I can't remember whether I did or not.

Q. Did you discuss with his family anything about the change of venue?

A. I may have discussed it with his mother.

Q. Do you remember?

A. No, sir.

Q. Did you—you mentioned earlier in your testimony about a psychologist. You never used a psychologist to

the jury in in any trial, guilt or innocence, or any other penalty phase at all, did you?

A. No, sir.

Q. Did you explain to the psychologist the type of evidence that could come in to be admitted in the penalty phase of the trial?

A. Yes, we discussed it. He and I pretty well discussed it.

Q. And, do you think that other evidence that would have supported the things that you argued to the jury a better presentation of that evidence would have been helpful in the jury reaching its verdict?

A. You mean by using the psychologist?

Q. Any other evidence that would have supported the culpability or anything dealing with culpability of—the difference in culpability of the two individuals. Do you think that would have been beneficial?

A. The particular psychologist I had was—gave Mr. Burger an I.Q. test and found it to be 82. And, he also was of the opinion that Mr. Burger was a sociopath with a psychopathic personality. And, on cross examination in the confession phase, this attorney asked, he commented to the effect, I can't remember the exact comment, sociopath was not crazy, he didn't belong in an insane asylum, and he wasn't—shouldn't be treated as a criminal because of his compulsive behavior. But, made something—well, you can't put them in an insane asylum because they will let him out. Didn't know what to do with him. I felt that would be—that and related questions would be asked in the presence of the jury, so I decided at that point not to use the testimony of the psychologist in that phase.

Q. Did you know his opinion before you put him on the stand to testify?

A. I knew what he thought, and I told him to stay away from it.

Q. And, did you seek another opinion from another psychologist?

A. I didn't have one available.

Q. Did you try to get one? Did you make a motion for one from the Court?

A. No. I did not.

Q. Did you do it in the second trial?

A. No. It is the Court invariably when you make a motion for a psychiatrist or psychological examination, they will send them to Central State Hospital for an evaluation. And, the results I've had with personnel at Central Hospital as far as the defense is concerned is it hasn't been good at all. And, the only psychologist that I had available at that particular time was Dr. O'Hare, which I used. And, then because of the sociopath situation I did not use it. Now, I felt that any further examination he would come up with the same definition as a sociopath, and I didn't feel we could improve on our situation. The reason I was using psychologist, my main thrust in using the psychologist, was to attack the validity of his confession. To show involuntary consent in the confession.

Q. Did you ever consider using the psychologist for other things, other than that?

A. I could have—if he had been of the opinion, you know, question of sanity, I could have used that instance, but he was not of that opinion. I did not see the benefit of going out and trying to find the sociologist, or psychologist to use in that particular trial in that particular place, because I did not think that that would be effective. Not the way to do it. I felt the way to try that case was to take the evidence that was there and try to minimize Mr. Burger's participation in the crime. It was my opinion that that was the best way to try this case and that to try to drag in these other people, or some witnesses who may have known something, some little something about him and that would have said something like he was a good boy and went to church, I couldn't find any of those to start with. But, even so, I would not have used that type of witness because I did not think that

that was the way to handle that case. I felt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts, and then use the—my opinion in representing Burger was then use those facts to show that he was just there and was not entitled to be treated in the same manner as the person who was—who was the main actor in the thing. That he was a secondary, he was in a secondary position. Since there were two punishments in that particular situation, that he should be given the lesser of the two. I think that's the way that case should have been tried, and that's the way I tried it. And, I don't know of—today, if I had to go back and try it again I would do it in the same manner—I say in the same manner, much the same manner, using the same thing and hope I got a different jury. That's all. And, that's it.

Q. Now, did you consider showing degree of culpability between the parties, did you consider showing bad things about Mr. Stevens during Mr. Burger's trial?

THE COURT: Mr. Farmer, I think I've been very tolerant and liberal in this. Now, we're not going to retry everything that happened in the case. You've made certain allegations. I want you to address them. And, then I've got to recess this hearing because I've got other matters and I want to hear the thrust of your argument. This is your opportunity to examine this witness. Let's go on.

MR. FARMER: Yes, Your Honor.

Q. You representing, and your firm representing co-defendants, and knowing that information that would come out about co-defendants past and background that may be excluded at his trial would have affected the co-defendant's trial, is that correct?

A. Run that by me again?

Q. Yes. Bad things about Mr. Stevens' background that came out during Mr. Burger's trial would have hurt Mr. Stevens, is that correct, at his later trial?

A. It was two different juries.

THE COURT: Did you pull any punches in order to protect Stevens?

A. No.

THE COURT: If crucifying Stevens would have helped Burger, would you have done it?

A. Yes, sir.

Q. Did you do it?

A. Didn't have the opportunity.

THE COURT: What was available about Stevens that would have helped him?

A. Nothing that I know of.

Q. Did you investigate to see what was available?

A. We learned as much about both of these men as we possibly could.

Q. Did you go to Mr. Burger's—any town he had ever lived in?

A. No, sir. Except Hinesville.

Q. Did you talk to anybody other than his mother?

A. His mother and the attorney that I told you about earlier.

Q. All right, sir, tell me quickly, give me your educational background if you will?

A. Okay. I was graduated from Georgia Military School in Atlanta, Oglethorpe University where I studied premed for a year. Went to Florida State University where I studied art for about a year. Art Institute where I studied art. Of course, I went into the United States Coast Guard and I was in there for approximately two years, and came back out, worked for my father in his hospital there in Jesup all during the time as an X-ray and lab technician. Then I went to law school at the Atlanta Law School and passed the bar. That was in 1962.

Q. As I understand, you never graduated from college?

A. No, sir.

Q. And, you had what was equivalent to how many units in college did you obtain?

A. I think it was about 3 years.

Q. And, do you know, did you investigate anything about the expertise of any of the people that testified for the state, particularly the person that did the autopsy, did you know anything about his background?

A. Dr. Larry Howard?

Q. Yes?

A. I had known—I knew who Dr. Howard was, I had run into him on other occasions.

Q. Is he a medical doctor, in your opinion?

A. I don't remember whether Dr. Howard is a medical doctor or has a doctorate in forensic medicine. I don't think Dr. Howard is a medical doctor.

Q. Did you do any investigation with reference to any other legal issues in the case other than the jurisdiction issue and the confession issue?

A. Well, we went into admissibility on photographs. Took the position that the admissibility of the nude, decomposed body of the defendant (sic) was a violation of the defendant's rights guaranteed a fair trial and did extensive research on that. And, the—of course, the fact that he was displayed before a jury in the second phase of the trial in handcuffs. We did extensive research on that.

Q. And, that was before the jury?

A. He was placed in an ante room with the door open in a chair with handcuffs on and the jury about two thirds of the jury could see him where they were. We raised that issue. The Supreme Court and—well, the issue in the Supreme Court at that time made a motion for mistrial which was denied. Again raised the issue on appeal to the Georgia Supreme Court and then a petition for certiorari to the U.S. Supreme Court we raised the issue. They would not hear that.

MR. FARMER: Your Honor, at this time I would like to go into a prong of the *McKenna* standard dealing with capable of rendering assistance. Capable of rendering effective assistance. And, to do that I would like to—I'm asking the Court at this time because the Court has

ruled that I couldn't go into his understanding of the law. But, to go into that I need to ask him questions about the law. And, I would like to go into that, or make an offer of proof as to that prong of *McKenna* standard.

THE COURT: What is the State's response?

MR. HILL: Your Honor, first of all, I'm about like Mr. Leaphart. I don't remember these cases by names. If Mr. Farmer can tell me exactly what he's talking about. But, if he's talking about what I think he's talking about, I'm going to object because I think the issue here is what he did in this case. Not what his overall expertise in the law is concerned. I think we ought to confine ourselves to this case. I'm going to object.

THE COURT: Be a little more specific, Mr. Farmer.

MR. FARMER: Yes, Your Honor, I think that two standards under *McKenna* that are capable of rendering effective assistance, as I know this Court so well knows because the Court's—have written several opinions in this area. Just had one come back to—from the Fifth Circuit affirmed. And, then rendering, I think the rendering deals with this particular case, but I think the capable of rendering deals with the judgments that he made, his knowledge of the law.

THE COURT: Mr. Farmer, I don't think I'm going to go into that. I'll take another look at it. If I decide I am wrong in this regard, I'll reopen it and we'll come back and do it. But, I don't think I—I'm going to sustain the State's objection to it.

MR. FARMER: And, Your Honor, and that I'm not allowed to make the offer of proof?

The COURT: That's right. If I determine that I should have I'll just have to reschedule a hearing.

MR. FARMER: All right, Your witness.

THE COURT: You may examine.

CROSS EXAMINATION OF MR. LEAPHART BY MR. HILL:

Q. Mr. Leaphart, you went into your background very briefly. After you graduated from law school, where were you employed as an attorney?

A. I was employed with Judge Durwood Pye in Fulton County Court House in Allen, Georgia, as a law clerk.

Q. How long did you work with the Judge?

A. I worked for him for a little over a year and a half.

Q. All right, and then afterwards, what did you do?

A. Came back to Jesup, Georgia, and began practicing law with my uncle.

Q. All right, and how long were you in fact in Jesup prior to the time you represented Mr. Burger?

A. I came back to Jesup in 1963 and was in—

Q. About 14 years? Are you originally from Jesup?

A. Yes, sir.

Q. Is your family from Jesup?

A. Yes, sir.

Q. And, does your family have a long history in Jesup? Are they—you have a well established family line, then?

A. Well, we've been around there for a long time.

Q. All right.

A. My great grandfather came down there around the turn of the century as a doctor. And, then grandfather was a district attorney down there from around 1920 to around 1940 when he went to Congress. And, then my uncle was a lawyer there in Jesup and City Solicitor and State Court Judge until he died a few years ago. And, then my father was a doctor and my brother practices law in South Carolina.

Q. For a while you were a judge in Jesup, is that correct?

A. I was a judge long enough for them to have an election and decide they didn't want me around.

Q. You were a State Court judge, though?

A. Yes, sir.

Q. All right, have you served on any committees or organizations as a practicing attorney?

A. Well, I've been county attorney for Wayne County. And, I've served in that capacity for a total number of years, about 14 years. I did not serve for a period of one year. I represent the Board of Education. I've represented them for—since they existed back in Jesup. I'm a member of the Board of Governors of the State Bar Association. And, I'm a Member of the Georgia Trial Lawyers, and American Trial Lawyers.

Q. All right. At the time you represented Burger in the fall of 1977, approximately percentage of your practice was devoted to criminal law?

A. About 15, 20 percent.

Q. And, on direct examination you testified that you have represented criminal defendants in cases where the death penalty was pursued?

A. Yes, sir.

Q. Have you ever represented a defendant in a death penalty case where he was not convicted of murder, was acquitted?

A. Yes, sir.

Q. And, have you represented criminal defendants where the death penalty was pursued and the death penalty was not obtained by the district attorney?

A. Yes, sir.

Q. All right. Now, I think it was brought out on direct examination, you represented Burger through his first confiction, his appeal to the Georgia Supreme Court, the remand for the retrial on punishment, through that trial, through the appeals of the Georgia Supreme Court, and on petition for certiorari to the U.S. Supreme Court?

A. Yes, sir.

Q. All right. So, you were thoroughly familiar with the facts in Mr. Burger's case? Having been associated in it so long?

A. I think so, yes.

Q. Now, when did your representation of Mr. Burger terminate?

A. Whenever the Supreme Court of the United States denied our writ of certiorari.

Q. All right, Can you tell me the circumstances surrounding that? I mean, what did you do after you terminated and what did you do with the trial transcript and records?

A. This Patsy Morris, who is with the ACLU contacted me and because I could not under the law as I saw it, I could not continue as appointed counsel, with a petition for writ of certiorari and writ of habeas corpus, and she notified me and I got the transcript of both trials, copies of the brief, copies of the record, transmitted them to her. And, she had engaged a lawyer who I think became associated with Mr. Farmer.

Q. All right, now, prior to the time I provided you with a copy of the petition for writ filed in this case, you weren't contacted by Mr. Farmer, or the attorney who was originally associated about your representation in this case, were you?

A. No, sir.

Q. Nobody talked to you about it?

A. No, sir.

Q. And, the first time you knew you were charged with ineffective assistance of counsel, was when I sent you a copy of the petition?

A. That's correct.

Q. All right. Now, will you tell me the circumstances surrounding your appointment to the case? When did you find out you were appointed?

A. The Clerk called me up and said—I think it was Judge Knox, wanted me to represent him.

Q. All right, and then you—after you found out you were appointed, you went over and talked to Burger while he was in jail there in Jesup?

A. Yes, sir.

Q. And, you all talked about the case?

A. Yes, sir.

Q. And, he basically told you he did it, and he told you everything he told the police in his confession?

A. As I recall it was pretty close to it.

Q. All right. And, during your conference with Burger, that initial conference, you weren't able to find out from him any evidence that might have been beneficial to him as far as his involvement in the crime?

MR. FARMER: I object to Mr. Hill's leading the witness. I think if he wants to—

THE COURT: Well, both of you gentlemen have done that. Normally he would have the right—

MR. HILL: I think he's—I've got him on cross.

THE COURT: Well, only technically.

MR. HILL: Technically.

THE COURT: Don't lead the witness.

MR. HILL: Yes, sir.

Q. During your first conference with Mr. Burger, was he able to provide you with any information that might have been beneficial to him as far as his defense was concerned?

A. The only information he gave me that I felt was beneficial to his defense at that time was the fact that he had been interrogated by the CID some number of hours, I forget. At that time, I don't know if I had the exact number, and then grilled, from the early evening into the early morning. He told me he had not been advised of his rights, and I didn't know—you hear that a lot. And, I had to check that out. And, one of the things that he told me that I learned was the relationship of the three parties being involved in the—all involved in the United States Army.

Q. All right. And, after Mr. Burger told you that he was not properly advised of his rights, you moved on that information to do some investigation?

A. Yes, sir.

Q. What stage of Mr. Burger's criminal proceedings were you appointed?

A. I was appointed—I think it was about a week or so after he was arrested.

Q. So, you were appointed early on in the case?

A. Yes, sir. I think I was appointed soon enough.

Q. Now, regarding the allegation of a conflict of interest, I think you testified in direct that was nothing that presented you from going all out for Mr. Burger?

A. That's correct. Nothing ever arose that I felt was a conflict. I was prepared to—

Q. And, if I recall correctly, Mr. Burger and Mr. Stevens had a separate trial?

A. Yes, sir.

Q. Now, there is an allegation in the petition that you failed because of this conflict, alleged conflict, you failed to raise certain issues on appeal. Are you familiar with that allegation?

A. I know it is in the petition.

Q. Was there any set of circumstances that prevented you from raising any allegation that you felt had merit?

A. I don't know of—I raised every allegation that I could find.

Q. All right. Now, the petition also alleges that in his petition you failed to distinguish the acts committed by Mr. Burger and Mr. Stevens. Are you familiar with that allegation?

A. Yes, sir.

Q. You just testified using petitioner's exhibit 1, that you in your closing argument to the jury made a special effort to point out to the jury the differences in the acts?

A. That's correct. Also during the trial of the case I think we made a number of objections, of course, in the presence of the jury stating that our objection was that these were acts that were done by Stevens rather than Burger.

Q. In addition to the objections you made during the receiving of testimony, do you recall making any objections during the opening statement of the District Attorney along these same lines trying to distinguish—

A. I think I did. The record I think would correct me.

Q. Do you recall the substance of your cross examination of James Boxford in this case?

A. Not right off the top of my head, I don't.

Q. Do you recall in your cross examination trying to make a distinction between the acts performed by Burger and Stevens?

A. I think I cross examined Boxford on the—as to what went on when they picked him up in Savannah in an effort to establish that all of the—Stevens was the moving party.

Q. All right. Now, at the time you had your first conference with the petitioner who besides yourself and the petitioner was present?

A. I think we were alone.

Q. Now, you testified on direct that you interviewed State's witnesses, the ones that had information pertinent to this case. Is that correct?

A. Yes, sir.

Q. Did the petitioner ever provide you with the names of any witnesses that might have proved helpful to him at trial?

A. No, sir.

Q. I think you testified that you were instrumental in securing a psychological evaluation of the petitioner? Did you do that at your own expense?

A. Yes, sir. Well, I submitted it, I'm sure when I submitted my bill I'm sure it was included as an out of pocket expense which I was reimbursed for.

Q. All right. You also testified on direct that you had the occasion to talk to petitioner's mother—

MR. FARMER: Your Honor, I would ask Mr. Hill to ask the questions and not keep informing the witness what he testified to.

MR. HILL: I'm just directing,—

MR. FARMER: Leading questions.

MR. HILL: Leading questions.

THE COURT: All right, gentlemen, don't have any colloquy between yourselves. Examine the witness as though he were not on cross examination on direct examination.

MR. HILL: Yes, sir.

Q. Do you recall having any discussions with the petitioner's mother about petitioner's background?

A. Yes, sir.

Q. Was she able to give you any information that might have proved helpful to the petitioner at trial?

A. No, sir.

Q. Were you ever able to locate the petitioner's father?

A. No, sir.

Q. Other than the petitioner's mother, did any other member of his family contact you regarding this case?

A. No, sir, I don't believe so. Wait a minute, he was—Burger was married at that time. She immediately left him.

Q. Are you referring to his wife?

A. Yes.

Q. Were you ever able to locate her?

A. No, sir. I didn't know where she went.

Q. Did you ever engage in—

A. I think that's right.

Q. Did you ever engage in any plea negotiations in this case?

A. Yes.

Q. Could you tell me the substance of it?

A. Well, we—I constantly all during the time I represented Mr. Burger tried to negotiate a plea with the district attorney for a life sentence. And, he—during the first trial he just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to—in that time to try to negotiate with the—with the district attorney about entering a

plea, for Mr. Burger to serve a life sentence. And, he insisted on trying it and insisted on seeking the death penalty.

Q. What type of client was Burger, was he cooperative, etc.?

A. He was cooperative to—he was as cooperative as he could be. He failed to follow one of my basic instructions.

Q. What was that?

A. Asked him not to say anything to anybody about what he was charged with. He talked a good deal to others about what he did. Did that voluntarily over my instructions. Other than that he was cooperative.

Q. Did Burger enjoy talking about the crime?

A. That was my understanding.

Q. Prior to the time you went to trial, did you talk to Burger about what he should wear to Court, his demeanor in the Court?

A. Yes, sir. We got him some conservative clothes. And, as I recall I think he may have had a sport coat, I'm not sure. But, I know he had a white shirt and slacks.

Q. Did you advise him of his legal rights at trial, as far as his right to testify, etc.?

A. Yes, sir, we discussed that. I felt that under the circumstances that subjecting Mr. Burger to cross examination by the District Attorney would be very harmful.

THE COURT: How about the punishment phase? Did you consider whether or not to allow him to testify at that phase?

A. Yes, sir. It was my opinion that for him to testify would have—the risk, the risk—

THE COURT: What were you apprehensive concerning? Him gloating about it, or—

A. Yes, sir—

THE COURT: —what would have been the possible ill consequence to have flowed for him testifying at that phase?

A. His attitude.

THE COURT: Manifested how?

A. Indifference and even to the point that he may have gotten some sadistic—I don't say that would have come out, but I was fearful that that would manifest itself, to the jury.

Q. Did you give any consideration to the sequence of your closing arguments as far as the presentation of evidence was concerned?

A. I don't understand you. You mean did I prepare my closing argument in some design?

Q. No, that's not my question. My question is were you concerned with retaining your opening and closing arguments in the trial of Mr. Burger's case?

A. Yes, sir. I was.

Q. Did that influence your decisions on whether or not to present certain witnesses?

A. Yes, sir.

Q. Was that decision also influenced by the strengths and weaknesses of the—

MR. FARMER: I object to his leading on this crucial issue area. He might ask the direct question.

THE COURT: Objection overruled. Go ahead and ask the question. I'm the only one presiding.

Q. Did the weaknesses and strengths of these witnesses vis-a-vis your opening and closing arguments have a bearing on your decision as to whether or not to present them?

A. Yes, sir. I didn't have any witness I thought was particularly strong. And, I felt that the use of those witnesses versus the loss of the final argument to the jury, that I shouldn't do it. I felt that it was more advantageous to maintain that.

That was in the trial in the original case.

Q. Are you familiar with most of the people in Jesup who serve on the juries from time to time?

A. I'm familiar with a great majority of the people on the jury, I believe. Those I am not familiar with when I get the jury list I familiarize myself with.

Q. And, was that one of the considerations that govern your decision as to whether or not to file a motion for change of venue?

A. Yes. I basically felt that was about as good a place as any to try it. That people in Jesup are, I guess you don't like to talk in favor of your county to the detriment of others, but I've found that the people in Jesup were better educated and more liberal minded than the other counties in the circuit. I certainly didn't want to try this in Baxley or Hazelhurst. I don't know the people in Brunswick. Didn't want to try it down in any of the other counties. I was satisfied with the jury in Wayne County, as such. It was just a difficult case to try anywhere.

Q. And, were these same considerations exercised in making a decision of whether to file a challenge to the composition of the array?

A. Yes, sir. I was satisfied with the array that the jury had been reorganized some I recall some years ago. We were constitutionally all right. And, I felt a challenge to the array would just simply aggravate and probably—potential jurors, and they would have—and it would hurt him. I didn't feel, I didn't feel that that maneuver would benefit him. I felt it would have harmed him.

Q. For the purposes of the record, is the petitioner black or white?

A. He's white.

Q. Did you consider calling the petitioner's mother as a witness the trial?

A. Yes, sir.

Q. What was your ultimate decisions?

A. I decided not to call her because I felt that she could not add anything to it as such, other than being a mother and saying I don't want you to put my child in jail, or the electric chair. I don't think that she—she would have been subject to cross examination as to certain things that he had been involved in. I didn't think his mother under those circumstances should testify.

Q. Did you also give any consideration to what impression her appearance might make upon the jury?

A. Not really.

Q. Why did you not call the petitioner during the *Jackson-Deno* hearing?

A. I didn't want him to be subject to cross examination. I didn't know what he would say.

Q. Was this also one of your considerations for not calling him at trial?

A. Yes, sir.

Q. On both phases?

A. Yes, sir.

Q. In preparing for the *Jackson-Deno* hearing, what witnesses did you talk to?

A. I talked to—in preparing for the *Jackson-Deno* hearing we had a earlier petition for writ of habeas corpus that we filed at which time we had the investigating officers from the CID. I think two of them were present. We cross examined at that time concerning the confession. And, that's what when we got the—we used that in preparation for the *Jackson-Deno* hearing.

Q. Now, the items listed on the chart, what's been identified as petitioner's exhibit number 1, do those constitute all the differences in acts that you argued to the jury?

A. Basically, yes. I'm sure there was—used this as a guide, and I'm sure I mentioned other differences at the time and what they were, I don't remember.

Q. The motion—your arguments dealing with the jurisdiction of the Court to try the case as opposed to the jurisdiction of the Federal Government, what were some of the considerations you had in mind in pursuing that motion?

A. You mean the original motion?

Q. Yes, sir.

A. Well, I took the position that the defendant was a—that the Burger and Stevens and Honicutt, the victim were all members of the Armed Forces, U.S. Army. It

took place on the U.S. Army reservation. And, all of the acts of violence took place there. With the exception of the culmintaion of the act, murder. I felt that the federal court should have—I mean the Army should have jurisdiction, or had jurisdiction. Of course, there's some recent decisions that I did not have at that time which state it is different.

Q. Did you consider that the Army would not be seeking a death penalty?

A. That was one of the reasons we wanted to get him—try to get the jurisdiction back in the Army because of the fact that I don't think they have executed anybody in—what? Since 1940 something. As I recall.

Q. You testified that you submitted—did you submit any request to charge?

A. No, sir.

Q. Could you tell me concisely why you didn't?

A. Well, I didn't want to—

THE COURT: He already answered that as you lawyers frequently do, he was trying to trap the Judge.

MR. HILL: Yes, sir, I was just trying to get it that clear and that precise.

A. I don't want to quite say it that way, Your Honor.

THE COURT: It comes down to the same thing.

MR. HILL: Your Honor, I have what is marked as respondent's exhibit 1 and 2. And, I would like to hand those to—

THE COURT: What are they?

MR. HILL: Respondent's exhibit 1 is a certified copy of the record on the retrial of resentencing. And, Respondent's exhibit number 2 is a certified copy of the first trial, the guilt and innocence phase.

MR. FARMER: No objection, to either.

THE COURT: They are received.

MR. HILL: Your Honor, there is one question I would like to ask the Court. I've been out of my office quite a bit in the past two weeks and did not have an opportunity to have it Xeroxed.

THE COURT: You may supplement the record with a copy of them and send it back. If there is any question about it send Mr. Farmer a copy of them so if there is any question about the correctness of it he will report that.

MR. HILL: Thank you, sir.

THE COURT: Are we through with this witness?

MR. HILL: Your Honor, that's all the questions I had.

THE COURT: You may go down.

MR. FARMER: May we redirect, Your Honor?

THE COURT: All right, gentlemen, I have some other—all right, go ahead, briefly, and it better then be in response to what he asked.

MR. FARMER: All right, sir.

REDIRECT EXAMINATION OF MR. LEAPHART BY MR. FARMER.

Q. In response to the reason that Mr. Burger did not testify at the *Jackson-Deno* hearing, that as I understand that you did not want him cross examined, is that correct?

A. That's correct. And, I had, my main thrust of that *Jackson-Deno* hearing was—

THE COURT: You will have to speak up, Mr. Leaphart.

A. I'm sorry, Your Honor. Repeat your question, please.

Q. Is there any limitation on the use of his testimony at the *Jackson-Deno* hearing?

MR. HILL: Your Honor, I want to object. He's asking a question I think that we can examine the Court's opinions on that. It might change every day.

THE COURT: Well, I'm going to allow him to state his feelings. Objection overruled. What is the impression?

A. It was—in the *Jackson-Deno* hearing, of course,

you know, his testimony at the *Jackson-Deno* hearing as I understand, could not have been used in the trial of the case.

Q. Excuse me—we can't—

A. Could not have been used in the trial of the case before the jury but I didn't want the DA questioning him or subjecting him to a long cross examination where he could find out any more than he already knew.

Q. Was there anything that the DA didn't know about this case?

A. I don't know, but if there was, I certainly didn't want him to learn it. I didn't see any useful purpose in putting him up there. I felt that was another thing that I knew what type of case I had. I knew what I was up against. And, I was trying to limit his exposure in every way possible. And, I just did not feel that for the benefit of that hearing, and what I was seeking to prove, that he would have added anything to it. I think that—I made—I felt that putting him up there that somewhere down the line it was—I could possibly be harmed, or he could possibly be harmed from it.

Q. In your opinion, from trying this case, if the jury had known—if this had been tried in a place where the jury had known everything about Mr. Burger's background, everything about Mr. Honicutt's background, and everything about Mr. Stevens background, and everything about Mr. Boxwood's background, the four individuals involved, would they have given Mr. Burger a death sentence?

MR. HILL: Objection, Your Honor, I don't know what he means by everything about their background. It is obviously a hypothetical. If he's not going to put any facts into evidence about all these people's backgrounds, I don't think he should ask these questions.

THE COURT: I seriously doubt the admissibility of it. But, out of a sense of curiosity too, I'll hear it.

A. I don't think it would have made any difference. I think—I don't I say any difference—I think that he would have been harmed.

Q. No, I'm saying everything about Mr. Honicutt's background, and everything about Mr. Stevens background. The relationships between all of those parties. If all of that had been known?

A. Well, first of all, they didn't know who Honicutt was until they kidnapped him.

Q. I understand. But, if that had been known to the jury would that—

A. You mean, if they had known something distasteful about Mr. Honicutt whether or not that would have made any difference as far as the jury was concerned?

Q. Everything about the relationship—

A. No, sir, I don't think so.

Q. Is that what you told me when I talked to you the other day in your office?

A. I think it was.

Q. You didn't tell me that if they had known all about these people that no jury would give—

THE COURT: Well, I think—

A. I said that I surmised that probably the masochism involved on Honicutt's part by being as submissive as apparently he was, but I don't think that—I think that would have just added to a perverted situation.

THE COURT: All right, you may go down.

A. All right, sir.

THE COURT: Call your next witness.

MR. FARMER: Mrs. Foster.

THE WITNESS WITHDREW FROM THE STAND.

MR. LEAPHART: May I be excused, Your Honor?

THE COURT: I had better not excuse you until the hearing is over.

I hope that it will be rather brief.

THE WITNESS LEFT THE COURT ROOM.

MRS. BETTY FOSTER TOOK THE STAND, AND HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION OF MRS. FOSTER BY MR. FARMER:

THE CLERK: Mrs. Foster, come around and have a seat in the witness stand, please ma'am, and after you have a seat state your name and occupation and spell your last name for the record please ma'am.

A. My name is Betty Foster, I'm an Assistant Manager of an Apartment Complex in Baton Rouge. My last name is spelled F O S T E R.

Q. Mrs. Foster, are you related to Christopher Burger?

A. Yes, sir, he's my son.

Q. And, would you—I call your attention back to the time he was charged in Jesup, Georgia and was tried in that County. Did you go and appear at that first trial of Mr. Burger?

A. Yes, sir, I did.

Q. Were you contacted by anyone representing him before that trial?

A. No, sir.

Q. And, how did you find out about the trial?

A. My youngest daughter called her father at Christmas time, December of '77 to wish him a Merry Christmas. And, her step grandmother told her. Her father was not at home. He was Christmas shopping. So she called her step grandmother and she told her about it.

Q. And, is that the first contact you had with—when you appeared there, was that the first contact you had with Mr. Leaphart or anybody from his office?

A. Yes, sir.

Q. Had you ever known him before that time?

A. No, sir.

Q. At the time that you arrived there did you have a conversation with him?

A. Yes, sir. I went to the jail first. And, we had two days notice before the first trial was supposed to have been. I went to the jail and was told it had been postponed. I found out who his attorney was and went to see him.

Q. Did he tell you anything about the nature or what type of trial it was going to be, or what type of evidence would be able to be admitted in evidence?

A. No.

Q. What did he tell you?

A. He just told me that Chris was being charged with murder. There was a possibility that there would be a death penalty. And, that court had been postponed, he would let me know when it was to convene again. I found out very little at this time.

Q. All right, and was there any other conversation about Chris's background or his friends, or anything at that time?

A. No, sir.

Q. Did he inquire as to any potential witnesses, or anything about Chris?

A. No, sir.

Q. Then did you come down for the first trial?

A. Yes, sir.

Q. And, what opportunity and how long did you talk to him before the first trial?

A. I saw him for possibly a half hour prior to going to court.

Q. All right, and did he at that time tell you anything about the type of evidence that could be presented, or ask you anything about Chris's background?

A. He asked me if Chris had ever had any psychological checking, or anything, and I advised him that he had as a child. And, he asked me to try and through Chris's power of attorney get that information for him from the State of Indiana from Florida where I had taken it.

Q. Did you get that information?

A. Yes, sir. I did.

Q. And, did the psychologist ever talk to you? Did Dr. O'Hare ever talk to you, the psychologist that Mr. Burger's attorney Mr. Leaphart had hired, did he ever talk to you?

A. No, sir. I never saw him until during the first trial when he testified.

Q. A little bit louder, please.

A. I never saw him prior to the trial at the time that he testified at the trial.

Q. Did he ask you anything about Mr. Burger's background at all?

A. No, sir.

Q. Did you hear, did you hear the trial, were you present there for the trial?

A. Yes, sir.

Q. And, after he was found guilty at the first trial, did Mr. Leaphart tell you anything about what type proceeding could take place to determine what punishment he got?

A. No, sir, not really.

Q. All right. Do you have a friend, or do you know a person who is an attorney in Indiana who knows Chris?

A. Yes, sir, there is a gentleman who at one time was Chris's big brother, working—

Q. And, explain to me what a big brother is?

A. There is an organization in Indiana where interested men volunteer their time to be involved with children who for whatever reasons don't have a father-son relationship, or a big brother. And, they spend time with the child, taking him to baseball games, or whatever, to give them a sense of a father-big brother relationship.

Q. And, what is this individual's name?

A. Mr. Richard Halley.

Q. And, is Mr. Halley—what profession is he in?

A. He is now an attorney. At the time he was involved with Chris as a big brother he was in law school. He has since been practicing in Indiana.

Q. At the time that he—that Chris was involved in this case, was he practicing law at that time?

A. Yes.

Q. And, did you contact him about Chris's problem?

A. Yes, I did. He was one of the first people that I called because he was a friend of the family. And, was always there when Chris or I needed him. I asked him

if there was anything he could do. And, I told him I didn't have the money to help him in any way. And, he offered at his own expense to come to Georgia and assist in any way he could, not necessarily actively involved, but kind of in the background, helping with advice, or whatever. And, he offered to come at his own expense.

Q. Did he convey this to Mr. Leaphart?

A. Yes, sir, they talked by phone several times.

Q. And, did you later find out why he didn't come?

A. Yes, sir. I arrived in Jesup the day before Chris's trial. And, Richey wasn't there. So, I called him at home, and he was there. And, I asked him "Richey, I thought you were coming, why aren't you here?" And, he said "I spoke to Mr. Leaphart—

MR. HILL: Your Honor, hearsay.

THE COURT: How does this get around the hearsay rule?

MR. FARMER: Your Honor, I think that—I think that—

THE COURT: I don't think it does. You cannot get it under any exception I know.

MR. FARMER: If I might do this, if we might use it to establish why she took what action she took. That's the—

THE COURT: —the only tenuous way. I think that's going too far.

MR. FARMER: All right.

THE COURT: All right, I sustain his objection.

MR. FARMER: I would like to make an offer of proof that if—

THE COURT: I'll allow you to do it.

MR. FARMER: If it were admitted to show what action she took, it would show that he was told because that he was a black person, that he should not come and that he should not be there to participate in the trial, or be there to assist in any way in legal matters. And, that she had relied on him as being a person that she had

confidence in to help. And, that—that would be the offer of proof. Now, tell me about the relationship of—between in addition to the big brother association, is there any—there is no kind of relationship between you and Mr. Halley, was there, any personal relationship?

A. No, sir.

THE COURT: Don't lead the witness.

MR. HILL: Objection, leading question.

MR. FARMER: All right, sir.

Q. Was there any kind of personal relationship? I mean is he any kind of spouse or spousal relationship?

A. Oh, no, sir. I knew him only through big brother.

Q. Now, did Mr. Leaphart at that time tell you that other people could testify as to mitigating circumstances about Chris?

A. No, sir.

MR. HILL: I'm going to object, Your Honor, to leading questions.

THE COURT: Don't lead the witness.

Q. Did he tell you anything about what could happen in the penalty phase of the trial?

A. No, sir.

Q. Did you know anything about what could happen after he had been found guilty, what evidence the jury could hear?

A. No, I didn't.

Q. Did anybody ask you about any possible witnesses —getting any witnesses to testify?

A. No, sir.

Q. After the first trial, did anybody ask you about witnesses for the second trial?

A. No, sir.

Q. Did anybody explain to you what could be put into evidence on his retrial on the punishment phase?

A. No, sir.

Q. Did you know?

A. No.

Q. Did you have any idea until we contacted you and told you about these proceedings?

A. No, I did not.

Q. Is there evidence about Chris's background that could—that could—that would affect a jury in determining whether he was—

MR. HILL: Objection, Your Honor. Calls for an opinion and I don't think the witness is qualified.

THE COURT: Objection sustained.

Q. Tell me if you will—if you will tell me a little of your background. When were you married, and who were you married to?

A. I was married to Chris's father. I was 14. He was 16.

Q. And, where were you when you married?

A. Indianapolis, Indiana.

Q. And, how many children resulted from that marriage?

A. Four.

Q. And, which in order of birth, which child is Chris?

A. Chris is the second.

Q. And, how long did y'all stay together as man and wife during that—the first time you were married?

A. 13 years.

Q. And, when was Chris born in that period of time?

A. During our fourth year of marriage.

Q. —And, what happened to Chris after that? After he was born, tell me what his life was about back then.

A. Well, Chris was kind of like a forgotten child. The oldest daughter was three years older than him. My last two children, there was fifteen months difference between Chris and his sister and his youngest sister and his brother. So, the baby got all the attention, and the little girl was beautiful long blonde hair with curls and she got a lot of attention. The oldest one got more privileges, but of course she got more responsibility. Chris got very little of anything, our time, our attention. He was just kind of looked over.

Q. Was there problems between the relationship of you and your first husband?

A. Oh, yes.

Q. That type of problems was this and why did they affect Chris?

A. Well, for instance the night Chris was born I had to have a neighbor take me to the hospital. His father came to see him and he had to leave immediately and I asked him why. He said he had trouble with the car and he had left it running—

THE COUT: Well, what is the relevance of this?

MR. FARMER: Your Honor—

THE COURT: I don't want to hear about that. I'm not going to hear about it.

MR. FARMER: Your Honor, what we are trying to show—

THE COURT: I know what you are trying to show.

Ask what she would have testified to if she had been there.

What would she have said, good or bad.

MR. FARMER: All right, sir.

THE COURT: That made him the person that he is.

MR. FARMER: All right.

Q. Tell me what you would have told—what you think would be important for the jury to hear about Chris's background if you had testified at the trial? If you would go ahead—

THE COURT: Did he win any honors in school?

A. Yes, sir, he won some honors for art. He has a fantastic artistic ability.

THE COURT: Tell me about that.

A. He entered several contests and drew posters, and so on.

THE COURT: All right, what else would you say?

A. Honors for that. He was in track.

THE COURT: What else?

A. And—

THE COURT: President of the Sunday School class?

A. No, sir. He attended Sunday School.

THE COURT: What kind of church?

A. Baptist.

THE COURT: What else.

A. He was given—

THE COURT: Scouts, or you said he was in some big brother type organization, is that something similar to scouts?

A. Not exactly.

THE COURT: I think you explained it.

A. He was in summer camp several times and won ribbons for swimming and archery.

THE COURT: All right, what else would you have—

A. Things of this nature.

THE COURT: —said about him that made him a worthwhile or a good human being?

A. Chris is a very warm gentle, loving person. He is a follower.

THE COURT: Okay. What else would you say?

A. I would say I wish I had taken more time with him. I wish I had guided him better. He was switched from his father to me back and forth, back and forth. He never felt like he belonged anywhere.

THE COURT: Did he graduate from high school?

A. No, sir.

THE COURT: How far did he go in school?

A. He completed the 9th grade. He just recently got his GED.

Q. That's been since he was in prison that he got his GED?

A. Yes, sir.

THE COURT: What kind of trouble was he in?

A. Things like playing hookey, a whole bunch of them would skip school.

THE COURT: Any shoplifting, or fighting, or anything of that nature?

A. No fighting. He shoplifted one time, a candy bar.

THE COURT: That was the only bad thing that you know about him?

A. Yes, sir.

THE COURT: Okay.

Q. Tell me how he was—you said he was shifted from house to house, explain to me what about his background about that shifting, and about the influence of the person that you were living with later, not his father, but the man you were living with later upon his life?

A. Well, I remarried and his stepfather did not want him, and he made it quite plain to Chris and I that he wasn't welcome and he didn't want the responsibility of Chris. There was nothing but a stone in this path. And, it was—I'm going to throw him out on the street. So, I'd send him back to his father. His father didn't want him. So, I get him back. He never knew from day to day where he was going to live, where he was going to sleep that night. His stepfather got him involved with marijuana, and that was the whole point of his life, where the next bag was coming from, or the next bottle of beer. And, this was the kind of influence that he had. And, I was so busy trying to keep this marriage together that I let it cost my son's security. He just—he had no sense of his own self worth.

Q. You mentioned earlier that he was a follower. Would you explain that?

A. When Chris, whether it was a sport he was involved in, or trouble, he always was with a group. I did this because they wanted me to. He did not go out singularly by himself and get himself in trouble. He wanted to be accepted by the group. And, he—it meant that he went with them, hook school, or whatever, that's what he did, for acceptance.

Q. And, how was he treated by your—by his stepfather, in what ways was he treated and disciplined?

A. He had two stepfathers. The first one beat me and Chris when Chris tried to help me.

Q. And, how do you mean that, he tried to help you?

A. He would see him beating me and he would try to step in between us and fight him, and he took a beating too. And, not just one, but many times.

Q. And, what age was he when this was—

A. 11.

Q. And, you moved from Indiana to Florida, is that right?

A. Yes.

Q. And, Chris didn't come?

A. No.

Q. Did he later come?

A. Yes. He ran away from his father's and he hitchhiked from Indiana to Florida.

Q. And, why did he run away?

A. Because it was unbearable there. He was physically mistreated, physically and emotionally.

Q. And, how did he get to you and what was his state when he got there?

A. He got to me by hitchhiking. He had no money, he had a knapsack with a few belongings in it. He had a new pair of shoes. And, it was in winter time. And, to get to me he sold those shoes for $2.45 to get him something to eat. When I picked him up in Tampa he was in his stocking feet, and it was very, very cold.

Q. How was he treated by the man you were living with at the time?

A. The first night he arrived he told us both I don't want him here, he doesn't belong to me. He's got no place here. Get him out. Where is he going to go? Where he came from. I don't care. Back on the street. This is what he heard the night he arrived.

Q. Did he get in trouble in Tampa?

A. Yes, he did.

Q. What happened as a result of that?

A. He was involved in an auto accident in our car. And, I was gone that day. When I got home a State Trooper was waiting for me. And, he said he had Chris

at the juvenile detention home, that I could come and get him. Send him gack to Indiana. I didn't care. I just told him I didn't want any part of him. He could keep him. Send him back to Indiana. I didn't care. I just didn't want any part of him.

Q. What happened then?

A. The authorities returned him to Indiana to his father. And, his father refused to take him. So, the Indiana authorities met the plane, and he went from the airport to the juvenile detention home there.

Q. And, what happened then?

A. He was kept there a few weeks. He went to Court. The judge agreed to release him in his father's custody with the understanding he was on probation would have to go back to Court at a later time. His father agreed to that. The judge—when they then left the court he wouldn't let him go home with him.

Q. His father wouldn't?

A. No, sir.

THE COURT: Are you speaking of personal knowledge or hearsay?

A. I know this.

THE COURT: Were you there or—

A. No, but I—

THE COURT: Or were you in Tampa?

A. I was in Tampa, but his father told me this, because I called him to find out how Chris was.

THE COURT: I'm not—develop another area. This is all hearsay.

MR. FARMER: Your Honor, we would like to admit this also for the purpose—

THE COURT: No. I—Mr. Farmer, we have certain issues, legal issues that we have to judge, here. Regardless of how regretful everything is, I cannot try it. We're here really in an appellate procedure. And, I know you are saying these things would have been compelling to a jury. But, if they were hearsay before me they would obviously have been hearsay before that jury.

MR. FARMER: Yes, your Honor. I would like to make a motion at this time that this testimony be considered in connection with affidavits that we have. We have approximately seven affidavits from people in Indiana to allow us—that her testimony be in support of a motion to allow us to take the depositions of these individuals who can testify not from hearsay. And, that what we are trying to show is that the evidence did exist, and does exist. And, we have affidavits to support the motion for the depositions, and affidavits to support the evidence that could have been presented to the jury. And, we want the court to consider this testimony and these affidavits for two purposes. And, to let us take the depositions and bring the evidence to the Court. And, to—what evidence could have been presented to a jury in his trial as mitigating circumstances.

THE COURT: Well, obviously, if one searches every —well, I will withdraw the comment.

MR. HILL: Your Honor, I want to oppose his motion. I think the Court has already ruled in its order which set this evidentiary hearing down that it was not going to allow depositions.

THE COURT: That's right.

MR. HILL: And, we were going to limit the issues to those here—

THE COURT: I'm not going to accept it, Mr. Farmer. Is there anything else from this witness?

MR. FARMER: Yes, Your Honor. I—before I complete with this witness I would, if it is the Court's pleasure, I would like to ask that these affidavits be considered under 28 U.S.C. 2246 as direct testimony on this particular issue. And, I know the Court can't rule on—

THE COURT: Let me—file them. And, I will make a determination on that issue whether I'll need to make any other finding on them.

MR. HILL: For the record, Your Honor, I want to object to that admission into evidence.

THE COURT: Well, he is going to file them. I do not know whether they will be admitted into evidence. But, since they are here, I'll make a determination.

All right, let's proceed, Mr. Farmer.

MR. FARMER: Yes, Your Honor. Mr. Nercy will take care of the filing. There is a brief in support of admission of these.

THE COURT: Okay. Is there anything else of this witness?

MR. FARMER: Yes, sir.

MR. HILL: Your Honor, I have not been served with a copy of that.

THE COURT: I realize that. They will give them to you. I won't even physically look at them until I hear from you and him. And, you may do that in a response brief. All right.

Q. What happened to Chris after the time that he returned from Tampa, Florida to Indianapolis, Indiana?

THE COURT: Well, she's already said that she was in Tampa. And, I have told you not to go into that.

Q. Do you know of your own personal knowledge what he did after that time? Do you know what he did after that time, what Chris did?

A. Yes, I know he joined the Army.

Q. And, his age at the time that this particular act happened, do you know his age at the time this act happened? At the time the crime that we are here discussing?

A. 17.

Q. And, were you in any way consulted about whether Chris could testify before the jury or not?

A. No, sir.

Q. Were you given any reason to believe that you could testify before the jury or not?

A. No, sir.

Q. Did you since the time that Chris has joined the Army, have you remarried again?

A. Yes, I have.

Q. And, who is your present husband?

A. Marian Foster Senior.

Q. And, did Mr. Foster attend the trial with you on the second occasion?

A. Yes, sir.

Q. At the time that he attended the trial with you on the second occasion did you and Mr. Foster have an opportunity to talk with the family of the person who had been killed, Mr. Honicutt's family?

A. Yes, sir, I did.

MR. HILL: Your Honor, I want to pose an objection. I don't see how it is relevant, either.

MR. FARMER: Your Honor, is the Court saying—

THE COURT: Well, you asked did she talk to him. She answered yes. Now, I suppose that's a departure for something else.

MR. FARMER: Yes.

THE COURT: But, I don't see how that is relevant.

MR. FARMER: Your Honor, its

THE COURT: What is she going to say?

MR. FARMER: Evidence that the family of the victim could have presented. I think that we're talking about two things that this witness can testify to. I think this witness can testify as to what she could present as evidence.

THE COURT: Gentlemen, I'm going to terminate this hearing. All right, Marshal? We'll be back in ten minutes to take up something else.

NOTE: RECESS.

END OF PROCEEDINGS FOR THE DAY.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CV280-114

CHRISTOPHER A. BURGER, PETITIONER

vs.

WALTER B. ZANT, Warden, Georgia Diagnostic and Classification Center, RESPONDENT

ORDER

Before the Court is a petition for writ of habeas corpus for review of the judgment of the Superior Court of Wayne County, Georgia, and the conviction and sentence of death imposed upon the petitioner. Numerous arguments have been raised with respect to both the finding of guilt and imposition of sentence. For reasons developed below, the Court finds merit only in petitioner's claim that certain defective charges at the sentencing phase may have denied the jury proper guidance in its deliberations. Petitioner's sentence will therefore be vacated and his case remanded for further proceedings.

Background

Petitioner Christopher A. Burger was tried before a Superior Court jury in Jesup, Wayne County, Georgia, for the murder of Roger E Honeycutt, a soldier who, like Mr. Burger, was stationed at Fort Stewart, Georgia. Trial was held on January 23-24, 1978, before the Hon-

orable Robert L. Scoggin. Petitioner was found guilty, and after a separate sentencing proceeding, the death penalty was imposed. The Supreme Court of Georgia affirmed the finding of guilt by an Order of September 5, 1978. However, the Court also concluded that jury charges with respect to the sentencing phase of the proceedings were defective, and accordingly, the case was remanded for retrial with respect to sentence only. *Burger v. State*, 242 Ga. 28 (1978).

A second trial limited to the question of sentence was held before Judge Scoggin on July 16, 1979, with the death penalty again imposed by the Court on July 19, 1979, pursuant to the second jury's determination. On March 14, 1980, the Supreme Court of Georgia affirmed petitioner's sentence based upon the view that one aggravating circumstance had been properly charged on and found by the jury. Two other aggravating circumstances were invalidated by the Court in light of certain defective charges by the trial judge. *Burger v. State*, 245 Ga. 458 (1980).

Thereafter, petitioner filed for writ of certiorari in the United States Supreme Court. Petition was denied on June 2, 1980. Motion for reconsideration was similarly denied on August 11, 1980. On September 16, 1980, the Superior Court of Wayne County, Georgia, set October 2, 1980, as the date of execution. On October 1, 1980, petition for writ of habeas corpus was filed in the Superior Court of Butts County, Georgia. This action was also dismissed on October 1, 1980. Application for certificate of probable cause to appeal and motion for stay of execution were denied by the Supreme Court of Georgia on October 1, 1980, as well.[1]

The present action was filed in this Court on October 2, 1980. At that time the Court ordered a stay of execution to permit consideration of the various issues raised in the petition. Subsequently, the Court has entertained

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[1] Respondent stipulates that exhaustion of state remedies is not an issue in this case.

oral argument from the parties, first at a hearing conducted December 12, 1980, and more recently at another proceeding held on March 7, 1981. At that time, the Court received evidence relating particularly to claims of ineffective assistance of counsel. Certain written materials have also been received and examined by the Court. The results of this analysis are developed below.

Facts

Christopher Burger was indicted along with Thomas D. Stevens, another soldier at Fort Stewart, for the murder of Roger E. Honeycutt.[2] Evidence developed at trial tended to show that, on September 4, 1977, Burger and Stevens were drinking at a club on post. After exhausting their resources, they decided to raise more money by robbing a taxicab. They then procured a butcher knife and a sharpening tool from the mess hall for use in the robbery and called a cab. They also spoke to a friend and fellow soldier James Botsford. Private Botsford had just arrived at the airport in Savannah after an emergency trip. Petitioner and Stevens agreed to come to the Savannah Airport and bring him back to the base.

Shortly thereafter, at around 10:00 P.M., the victim Honeycutt, who was driving at night to supplement his military income, picked up petitioner and Stevens at Fort Stewart. During the trip to the airport, petitioner and Stevens accosted Private Honeycutt with their weapons, forced him to stop the cab, and took sixteen dollars from him. Honeycutt was then placed in the back seat of the taxi, and the trip resumed with petitioner driving.

Petitioner and his confederate continued their search for money in the cab as they drove on to the airport. Stevens moved to the back seat of the vehicle. Private Honeycutt was then forced to disrobe while Stevens searched each article of clothing and then discarded it by

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[2] Mr. Stevens was tried separately, convicted, and also sentenced to death. See *Stevens v. State*, 242 Ga. 34 (1978).

throwing it out the window of the car. After Honeycutt had been completely disrobed and no additional money discovered, Stevens forced him to paritcipate in acts of oral and anal sodomy. Subsequently, the victim was placed in the trunk of the cab, still nude, and with his hands tied behind his back.

Petitioner and Stevens then continued to the airport, and picked up Private Botsford. During the drive back to Fort Stewart, they explained what they had done to Botsford in some detail. When Botsford expressed incredulity, they confirmed their story by exchanging brief remarks with Private Honeycutt who could hear and be heard from within the trunk. After some debate, Botsford induced his friends to promise that Private Honeycutt would not be harmed, and, in turn, agreed not to notify the authorities. Later, Private Botsford was dropped off at Fort Stewart. Petitioner and Stevens drove on to Jesup, and finally to a nearby "borrow pit" which was filled with water. After they had wiped their fingerprints from the car and removing a C.B. radio, Mr. Burger raised the trunk lid and asked Private Honeycutt if he was all right. Honeycutt stated that he was. After closing the trunk, Mr. Burger started the car and drove it into the pond, jumping out as it entered the water. The victim was still alive at this time. Thus the autopsy showed drowning as the cause of death.

Petitioner and Stevens then returned to the army base. The next day they contacted Botsford and assured him that the victim had been released unharmed. Private Botsford in turn told them that he had not been to the police. However, on September 12, 1977, Botsford contacted the state patrol and authorities on post after he learned that a local taxi driver had been missing for several days. Shortly thereafter, petitioner and Stevens were picked up by military police. After briefly denying all knowledge of the crime, petitioner made a complete confession and described the incident in detail. He also took the authorities to the pit and pointed out where Private

Honeycutt's body could be found. This confession and Private Botsford's testimony were primary sources of evidence in the subsequent trial. Mr. Burger did not testify.

Issues Presented

Petitioner has alleged approximately fifteen grounds for reversal of his conviction or sentence or both.[3] Certain of these arguments are so plainly inapplicable to the present case as to demand no discussion here. Many points do however merit some review. First, with respect to the guilt-innocence phase of trial, the Court will consider petitioner's claims of constitutional error based upon (1) use of petitioner's confession which was allegedly obtained under circumstances which render it involuntary and, hence, inadmissible; (2) failure to properly advise petitioner of his *Miranda* right to appointed counsel which is also alleged to vitiate the confession; and, (3) certain language in the trial court's charge which allegedly shifted the burden of proof with respect to criminal intent to the petitioner. The Court will next consider other claims of error which impact on both the guilt and sentencing phases of trial: (1) the introduction into evidence in all proceedings of allegedly inadmissible hearsay statements made by Stevens; and, (2) generally ineffective assistance of counsel as allegedly manifested in virtually all aspects of the preparation and conduct of petitioner's defense. Finally, the Court will review two arguments which relate only to sentencing proceedings against Mr. Burger: (1) the alleged failure of the Georgia Supreme Court to apply a constitutional definition of one aggravating circumstance in its review of the death sentence; and (2) failure of the trial court to instruct fully on the remaining aggravating circumstances.

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[3] Petitioner's motion to permit amendment is thus granted. Arguments raised thereby, which primarily concern *Miranda* warnings and admission of statements by Stevens, are considered and rejected below.

Analysis

(1)

Mr. Burger contends first that his confession was obtained "through the use of psychological coercion, tricks and ploys. Petitioner was not mentally competent to understand his right against self-incrimination, nor was he competent to waive that right." In support of these claims, petitioner relies *inter alia* upon evidence of his sub-normal intelligence, the length and conditions of interrogation, and petitioner's alleged intoxication at the time of questioning. Petitioner also refers to certain defects in the *Miranda* warning given by Fort Stewart authorities, which will be considered separately.

At trial, a hearing into the circumstances of petitioner's confession was conducted out of the jury's presence. *Jackson v. Denno*, 378 U.S. 368 (1963). At this *Jackson v. Denno* hearing, testimony was received from investigating officers of the Jesup Police Department and the Fort Stewart Criminal Investigation Division (CID), as well as from an expert employed by the defense to perform various psychological tests on Mr. Burger. The testimony of the various police officers indicated that petitioner was picked up by military authorities early in the evening of September 12th, after Private Botsford had gone to these authorities with his information. Questioning began at about 9:20 P.M. At 9:25 petitioner was read his *Miranda* rights and signed a waiver permitting the interview to continue without counsel. After initially denying any knowledge of the crime, Mr. Burger began detailing the entire incident to investigators. At about 11:10 P.M. he agreed to show the military police where the cab was, because he could not verbally pinpoint the location. At 11:25 P.M., Mr. Burger and military authorities left Fort Stewart to go to the pond. They reached this pit at 12:34 A.M., remained there about thirty minutes, and then returned to Fort Stewart, arriving back at the CID office around 1:54 A.M. The

investigating officer then typed out a four-page confession, which required about an hour and a quarter. The confession was signed around 4:00 A.M., after petitioner had sworn to its accuracy.

It thus appears that petitioner was in custody for perhaps nine hours before he signed the confession. It also appears that he was in contact with no one except law officers during this period. However, the uncontradicted testimony of these officers indicated that petitioner was "alert and coherent" at all times. T. 174. Furthermore, he appeared to understand his rights, but nonetheless preferred to proceed without an attorney. T. 170. There was no reason suggested for believing that he was under the influence of any drug. T. 175. Nor did any testimony suggest that "tricks or ploys" had been used to elicit the statement.

Testimony from petitioner's psychologist did not call these facts into serious question. This expert stated that Mr. Burger does have limited intellectual capacities. Test results indicated an I.Q. of 82 as well as some possible brain damage. However, it was pointed out that these limitations had not prevented petitioner from successfully completing two courses of military training and otherwise functioning adequately in daily life. The psychologist also testified that petitioner's limitations were not so profound as to put him "beyond the concept of understanding right from wrong." T. 250. Furthermore, the psychologist found no reason to believe that the confession had been improperly obtained, or indeed that "tricks and ploys" would have been needed to elicit the statement:

> I think he would enjoy the idea, frankly. This would be a great opportunity to display his psycho-pathological behavior. He'd probably shout in the wind as much as he could of all the things he might have done.
>
> T. 250.

It appears then that Mr. Burger is a man of limited capacities. However, he was not incapable of normal functioning in his military role. Nor was he beyond understanding the nature and significance of his crime or his confession. It also appears that he was questioned at some length but not against his will or while under the influence of drugs or otherwise incompetent. Considering the "totality of these circumstances" the trial court found that the confession had not been improperly obtained. T. 268. It was thus submitted to the jury for a second determination, which was apparently also unfavorable to the defendant. The present petition suggests no basis for disturbing this determination, and this Court sees none. Therefore, Mr. Burger is entitled to no relief on this point. *LaVallee v. Delle Rose*, 410 U.S. 690 (1972); *Howard v. Maggio*, 540 F.2d 1280, 1282 (5th Cir. 1976); *Branch v. Estelle*, 631 F.2d 1229, 1233 (5th Cir. 1980).

Second, petitioner contends that his confession should have been excluded as having been obtained pursuant to an improper *Miranda* warning. This point was also argued at length in the trial court. *See, e.g.*, T. 197-98. Here, as at trial, constitutional error is alleged to have developed out of the unusual circumstances of petitioner's arrest. It is undisputed that petitioner received the standard *Miranda* warnings accorded all military suspects at the time of his first interrogation. This warning informs the suspect that he may have the services of a military attorney at no cost, or, if he so chooses, that he may retain private counsel at his own expense. It is similarly undisputed that, when petitioner was turned over to the Jesup police, he was given a standard civilian warning that a private attorney would be provided for him if he were indigent and so-requested. T. 200. Error is, however, claimed in that military police failed to inform petitioner of his right to free private counsel as soon as they became aware that the homicide might have been committed off-post and therefore, been subject to civilian jurisdiction.

The adequacy of a *Miranda* warning must be viewed in light of the purpose it is intended to serve. There can be little doubt that this purpose is to provide persons in custody under suspicion with legal advice which might enable them to better know and protect their rights and interests. *Miranda v. Arizona*, 384 U.S. 436, 479 (1965). In the present case, petitioner was afforded access to the only counsel military authorities had power to provide. Similarly, petitioner was accorded the opportunity to obtain civilian counsel by civilian authorities. At no point was Mr. Burger questioned in circumstances where he could not have obtained legal assistance without cost had he so-desired. Furthermore, there is no reason whatever to believe that military counsel would have been any less skillful or diligent than a civilian attorney in protecting petitioner's interests during military interrogation. Petitioner's argument would apparently require that a suspect be offered the advice of counsel who could represent the accused in all circumstances which might develop from the investigation. The Court knows of no authority which would support such a requirement. The Court further concludes that the purposes of *Miranda* are adequately served when a suspect is given access to legal assistance competent to assist him in the questioning then in progress. Petitioner was at all times afforded such protection. Thus, the present argument is without merit.

Third, petitioner contends that the trial court's charges on the issue of intent impermissibly shifted the burden of proof with respect to this essential element of the crime charged. The language thus questioned is as follows:

> Now, by definition, ladies and gentlemen, in our State a crime is a violation of a statute of this State in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.

A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.

A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

T. 409-10.

This charge, of course, employs language which has been the subject of lengthy judicial consideration, and, in some contexts, of very severe criticism. *United States v. Sutton*, Slip No. 79-5681, Fifth Circuit, decided February 2, 1981; *United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977). However, it is clear from *Chiantese* as well as other decisions that no *per se* rule exists against charging the truism that a person is normally presumed

to intend the natural and probable consequences of his actions. 560 F.2d, at 1255-56. Thus, it is necessary to begin any analysis by determining the type of presumption which is involved. Only then is it possible to ascertain the proper standard for constitutional analysis. *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979).

It is apparent from examination of the charge at issue that it creates no mandatory presumption. Quite the opposite, the trial court was careful to state and restate the principle that there could be no presumption of criminal intent and that at all times the state had the burden of proving such intent beyond a reasonable doubt. The language in question thus appears to create no more than a permissive inference which the jury was left free to apply or reject as it saw fit in view of all the evidence in the case. Moreover, this interpretation is in accord with analysis of the legal significance of the charge by the Georgia Supreme Court. *See Skrine v. State*, 244 Ga. 520 (1979).[4]

It is therefore appropriate to analyze the present charge under *Ulster County Court v. Allen*, 442 U.S. 140 (1979). In *Ulster County*, the court defined a permissive inference as one which "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant." 442 U.S., at 157. The Court then described the test for a constitutional attack on such a presumption:

> When reviewing this type of device the Court has required the party challenging it to demonstrate its invalidity as applied to him. Because this permissive presumption leaves the trier of fact free to credit

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[4] Even though the Georgia Supreme Court is the final authority on questions of state law, this Court must still ask how a jury might have interpreted the trial court's charge. Here, however, there is no reason to conclude that the jury's interpretation could have departed from that of the Georgia court. *See Sandstrom, supra*, at p. 516.

> or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation, is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.
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> 442 U.S., at 157 (citations omitted).

The proper question thus becomes whether there was a rational basis under which the jury might infer criminal intent from the defendant's actions with respect to the murder. The evidence, of course, indicated that Mr. Burger raised the trunk lid of the victim's taxicab and specifically asked him if he were all right. Mr. Burger himself then drove the vehicle directly into the pit where it submerged, drowning Private Honeycutt. There can be no real doubt as to whether there exists a rational basis by which the jury could conclude that this course of conduct was intended by petitioner. Furthermore, these circumstances as well as other evidence in the record clearly provide ample basis to support a conviction independent of any presumption. 442 U.S., at 160. Nor does it appear that any problem would be created by replacement of the rational relationship test by a more stringent "reasonable doubt" standard. See *Barnes v. United States*, 412 U.S. 837, 842-43 (1978). Here, it seems entirely clear that the facts upon which the presumption is founded are sufficient to support an inference of intent to kill beyond a reasonable doubt. See *Ulster County, supra*, at 166.

This analysis is supported by review of Fifth Circuit cases considering jury instructions which employ this "natural consequences" language. As was indicated above, these cases make clear that there is no *per se* rule

against such an instruction. The real concern is not the phrase "a person is presumed to intend the natural consequences of his voluntary actions." In fact, the Court has specifically approved pattern charges which use these words. *Chiantese, supra*, at p. 1255-56. Error is introduced only when this language is coupled with other phraseology which appears to place some burden of producing evidence on the accused. Thus, the Court emphatically rejects the following language:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. *So unless the contrary appears from the evidence*, the jury may draw the inference. . . .
>
> 560 F.2d., at 1249. See also *Mann v. United States*, 319 F.2d 404 (5th Cir. 1963) (emphasis added).

When one examines language of the charges in question, it is apparent that no such burden shifting can be inferred. Here the trial court specifically charged that the accused "enters upon the trial of this case with the presumption of innocence and that presumption remains with him throughout the trial and until and unless the State . . . convince(s) your minds beyond a reasonable doubt as to his guilt." T. 404. The Court charged further that a "person will not be presumed to act with criminal intention." T. 409. With reference to the "natural consequences" instruction, the Court specifically labeled the presumption "rebuttable." T. 410. Furthermore, immediately after stating it, the Court again indicated that "a person will not be presumed to act with criminal intention." T. 411. Such a statement hardly repeats the error criticized in *Chiantese* and related cases. Similarly, the trial court's concluding reference to "natural consequences" is couched language directly reminding the jury that intent is "an essential element that the state must prove beyond a reasonable doubt," based upon the jury's evaluation of all the evidence before it.

In sum, the trial court's charge does not appear to create an real possibility of impermissible burden-shifting. The situation condemned in *Chiantese*, *Mann*, and *Sandstrom* is simply not present here. Instead, the challenged instructions specifically remind the jury that the burden of proof remains at all times on the state. These instructions create only a permissible inference which the jury is left free to accept or reject in accord with its view of the evidence. Furthermore, it appears that this evidence amply supports the inference whether evaluated under a "rational basis" or a "reasonable doubt" test. Accordingly, petitioner's claim of error is without merit.

(2)

Petitioner alleges two other constitutional violations which would impart on both phases of trial. Petitioner contends first that he was denied due process of law by admission of certain hearsay statements by Stevens into evidence. Reference is thus directed primarily to the testimony of Private Botsford. In this testimony, Botsford recounted *inter alia* various remarks made directly to him by Stevens while the petitioner was also present in the taxicab. These statements included references to the armed robbery which the parties had planned and carried out in concert. There was also considerable discussion of the sodomizing of Honeycutt which was apparently Stevens' idea, though petitioner obviously aided this crime by driving the taxi during its commission.

These statements by Stevens were admitted into evidence over objection by counsel. The trial court's ruling was based upon several provisions of state law. In particular, the court appeared to find the disputed remarks admissible as the statements of a co-conspirator during the course of the crime. T. 98. The court apparently considered this argument particularly compelling in view of the fact that petitioner was physically present when Stevens spoke, and testimony that he generally joined in

or approved Stevens' statements as they were made. T. 92, 94. Stevens' statements with reference to the sodomizing of Honeycutt were also admitted as showing "res gestae", or the petitioner's motive and course of conduct with respect to the eventual murder. T. 101.

It is claimed, of course, that these statements were inadmissible hearsay under state law and that the trial court's decision to admit was incompatible with fundamental fairness. However, it does not appear that admission of these remarks was in fact violative of any state rules of evidence. With respect to the evidence of sodomy, in particular, it appears obvious that this conduct was indeed part of the same series of events as the murder for which petitioner was charged. It is also obvious that the need to cover up this crime *inter alia* was a motivation for the murder. Thus, the Georgia Supreme Court has held that

> [g]enerally on a prosecution for a particular crime, evidence of another and distinct crime wholly independent from that for which one is on trial is inadmissible; but there are exceptions of this rule. One is, if the separate crime was committed as a part of the same transaction as that for which the accused is being tried, and forms a part of the res gestae.
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> *Hill v. State*, 201 Ga. 300, 303 (1946).

The Georgia Supreme Court found this rule applicable to the present facts. *Burger v. State*, 242 Ga. 28, 32 (1978). I find no reason to doubt this view. Similarly, I find no reason to question the trial court's rulings with respect to Stevens' other statements made in the course of the conspiracy. Such a determination seems entirely proper under state law. Ga. Code Ann. § 38-306. Furthermore, I can find no basis to support a conclusion that Georgia law with respect to statements of co-conspirators is subject to any constitutional infirmity. In fact, of course, the Georgia rule has been specifically approved

by the United States Supreme Court. *Dutton v. Evans*, 400 U.S. 74 (1970).[5]

Petitioner's second argument for general reversal relates to alleged inadequacies in the performance of counsel with respect to virtually every aspect of the preparation and presentation of his defense. The Court will not attempt to recount all the supposed failings of Mr. Leaphart. However, it appears that this charge involves several major allegations: (1) that a conflict of interest existed because Mr. Leaphart's partner defended Stevens in a later, separate trial; (2) that counsel failed to distinguish in his own mind and the jury's between the actions of the petitioner and Stevens; (3) that counsel failed to adequately investigate, research and present petitioner's *Jackson v. Denno* claim; (4) that counsel failed to investigate or question the composition of the jury, on which blacks and other minorities were in fact underrepresented; (5) that counsel failed to develop mitigating factors with respect to sentence; and, (6) that counsel inadequately presented petitioner's case on appeal.

As was indicated above, this Court conducted an evidentiary hearing relating specifically to these claims. At this hearing, Mr. Leaphart testified at length on the theory and conduct of petitioner's defense. Counsel indicated in substance that his strategy was to force the prosecution to prove all the elements of the case, while raising every objection available under the rules of evidence. Counsel also indicated that he tried at all times to avoid placing the petitioner on the stand because he

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[5] *Dutton* approves an application of the Georgia hearsay rule considerably more dubious than anything in the present case. Here, the co-conspirator's statements were generally adopted explicitly by petitioner as they were made. Moreover, Botsford's testimony involved statements during the actual development of the criminal conduct or specific efforts to conceal those actions. In *Dutton*, the court dealt with a statement made over a year after the crime was committed and wholly unrelated to any concealment effort.

feared that the jury would find little reason for mercy in petitioner's quite unremorseful attitude toward the crime. Similarly, counsel indicated that he had met with Mr. Burger's mother and discussed the possibility of her or others testifying in mitigation. However, Mr. Leaphart stated that he decided against using such testimony when it became apparent that it could provide little specific positive evidence, even though much unfavorable testimony was likely to emerge on cross examination. Mr. Leaphart also stated that his conduct of the petitioner's case was in no way hampered by his partner's defense of Stevens.

The legal standard with respect to this claim is stated easily enough. Petitioner is entitled to counsel likely to render and in fact rendering reasonably effective assistance. *Jones v. Estelle*, 622 F.2d 124 (5th Cir. 1980). Of course, this standard does not require errorless counsel. *United States v. Johnson*, 615 F.2d 1125 (5th Cir. 1980). Nor is it intended to require that an attorney's performance be ideal in every strategic or substantive particular. It is only necessary that counsel's performance fall within a sphere of reasonable legal skill and practice. When considered in these terms, the Court sees no basis for a finding of constitutional error.

Reviewing first petitioner's allegations of conflict of interest, it is important to note that such a conflict must be actual rather than merely speculative to support relief. *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979). Furthermore, it is clear that not every conceivable conflict is so egregious as to amount to a Sixth Amendment violation. *United States v. Alvarez*, 580 F.2d 1251, 1255 (5th Cir. 1978). In this connection, it is particularly significant that even joint representation of codefendants need not be a *per se* constitutional violation. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975). Thus, the present case would hardly demand an inference of error where the two indictees were tried separately by different, if also professionally associated, attorneys.

Petitioner has attempted to meet this problem by alleging that Stevens' defense was inconsistent and, hence, that Mr. Leaphart was under some pressure to temper his efforts so as to avoid undercutting his partner's theories.

However, Mr. Leaphart's uncontradicted testimony was that the defense of Stevens did not in fact involve inconsistent theories. Moreover, Mr. Leaphart's similarly uncontradicted position was that he in no way tailored his strategy toward protecting Stevens. This testimony is strongly supported by examination of trial record, which shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime. *See, e.g.*, T. 257-62. The present facts thus support no inference of any conflict of interest actual or potential. Neither do they admit an inference of prejudice arising out of counsel's alleged attempt to protect his partner's client. Similarly, it is clear from the trial record that Mr. Leaphart did not confuse petitioner's conduct with Stevens'. Quite the opposite, counsel objected repeatedly to Botsford's testimony to confuse the words of the two men. *See, e.g.*, T. 95, 98, 101, 106. Moreover, at petitioner's retrial, Mr. Leaphart used a chart specifically detailing the acts of each man in a direct effort to convince the jury of petitioner's lesser role in the various crimes. Plaintiff's Exhibit 1.

The Court is likewise unable to conclude that Mr. Leaphart failed to conduct proper research and investigation in the preparation of petitioner's defense at trial or on appeal. In fact, the trial record shows that Mr. Leaphart cited numerous authorities to the court in support of his arguments with respect to the evidence and the admissibility of the confession. *See, e.g.*, T. 264. Counsel also presented these arguments on appeal and in fact, of course, gained a partial reversal. Petitioner has offered no basis for concluding that additional measures were appropriate or would have been efficacious in any way.

Much the same situation prevails with respect to petitioner's claim of constitutional error in failure to investigate or challenge jury composition. There has been no showing made that such efforts were within the range of essential defense strategies and no showing that any useful result would have been achieved. Moreover, there is good reason to doubt both propositions in view of the fact that petitioner is white and, as a stranger to the community, not obviously subject to any particular local prejudice. Furthermore, according to Mr. Leaphart's uncontradicted testimony, the actual composition of the jury panel did not appear to reflect any such underrepresentation.

The Court is much more concerned by petitioner's allegations of ineffective assistance of counsel with respect to sentencing. Petitioner contends that Mr. Leaphart failed to interview him adequately so as to develop available mitigating factors. Petitioner also alleges that Mr. Leaphart failed to develop or use mitigating evidence which could have been obtained particularly from Mr. Burger's mother, Mrs. Betty Foster, who was present at trial and retrial. In support of these claims, petitioner offered testimony from Mrs. Foster in which she described at length the obviously quite unstable, unhappy home life Mr. Burger experienced as a child. Petitioner also offered a number of affidavits from childhood associates of the petitioner which similarly noted the difficulties he experienced as a youth and asked mercy in his behalf. Petitioner thus attempted to show that favorable evidence was available and, hence, that Mr. Leaphart's performance did not amount to harmless error. See *Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1980).

As was indicated above, Mr. Leaphart made a strategic decision in his conduct of the case to avoid revealing information concerning the petitioner's character to the maximum extent possible. Mr. Leaphart decided against calling petitioner to testify particularly because he feared that the jury would react adversely to Mr. Bur-

ger's "indifference" toward his crime and his generally "sadistic" attitude. Counsel also indicated that he had discussed the possibility of her testifying with Mrs. Foster several times, but decided against this, too, to avoid revealing violent conduct in petitioner's past.[6] Mr. Leaphart acknowledged that his strategy meant that some perhaps helpful information would not reach the jury; but, he felt nonetheless that a more complete presentation would have produced an "end result not to his benefit."

This Court is well aware of the extraordinary difficulty associated with deciding whether to offer character evidence in a capital case. When counsel decides to adduce none, a claim of ineffective assistance is all but guaranteed. On the other hand, when evidence is offered, the chance to make opening and closing arguments is lost. Moreover, counsel is without power to prevent the jury's hearing evidence of bad character which his witnesses may also possess. In the present case, all these considerations seem to have been reviewed by counsel in making his necessarily difficult decision. It further appears that Mr. Leaphart made a much more than merely adequate effort to gain maximum advantage from his choice. Thus, he, in fact, offered an extended and, at points, quite imaginative argument[7] for Mr. Burger. In this argu-

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[6] Mrs. Foster testified that Mr. Leaphart made only very minimal efforts to discuss petitioner's case with her and to develop possible mitigating factors. Mr. Leaphart's account suggested that he had talked with Mrs. Foster several times and made adequate if hardly ideal inquiries. Mr. Leaphart's account is supported by his bill, which lists two conferences totaling three and a half hours prior to trial and four conferences of unstated duration prior to retrial. Defendant's Exhibits 1, 2. Thus, the Court must conclude that Mr. Leaphart's investigation appears to meet at least minimal professional standards.

[7] Now, you get back down to capital punishment and the reason for capital punishment. The District Attorney has alluded to the "eye for an eye, and a tooth for a tooth", "life for life". Well, that is the old Jewish law, and still is the Jewish law, and is still the law

ment, counsel made full use of the lack of any evidence of prior violent crime by Mr. Burger. T. 426-27.

Thus, this Court has the task of weighing a strategic decision which was reached with at least some awareness of the relevant facts and then carried out in a manner which clearly meets "reasonable" professional standards. In this connection, petitioner has made much of the alleged benefits have accrued had Mrs. Foster and

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as the Moslems carry out in the desert communities in the Arabian deserts and places of that nature, where they live in tribes and move from place to place.

The reason for the Mosaic Law and the reason, one of the basic reasons for that harsh justice that was imposed by the earlier Jews in their march from Egypt to they finally got to the Promise Land was the fact that they would not stay long in one place, that they couldn't put up with prisoners. They couldn't—they had no way to house prisoners. So when you did something wrong, when you stole something from somebody, when you got in a fight with somebody and put out somebody's eye, or when you killed somebody, well, they just said, "well, you've killed him, so that's it. Blam, because we don't have time to fool with you, because we've got to be on down the road about another thirty or forty miles tomorrow and we have no place for you."

They needed the swift tribal justice. And, that swift tribal justice. If you read in the papers, is still being carried in Saudi Arabia, and places like that, because these people still move about in the same manner that Moses and them moved about thousands of years ago.

After the Jewish people settled in what is now Israel or the Promise Land, they went from an urban—from a tribal society which moved about to a—from tribal to nomadic society, to an urban society, and they built houses, and communities, and they lived in one place. And, at that time they began to build prisons, and places of punishment and confinement for people who committed crimes.

They no longer cut their hands off, or put out their eyes, or chopped their heads off if they did certain things. They began to an urban way of life. And, with the help of the Romans they progressed up until the time of Jesus Christ.

Now, Christ came along and brought in the idea that "wait a minute, we don't need this old attitude of an eye for an eye, and a tooth for a tooth. . . . T. 428-29.

others been called to testify. However, it seems obvious that Mrs. Foster's testimony would surely have robbed petitioner of perhaps the major argument in his brief, *i.e.*, counsel's claim that "[t]his is a man who has never, as far as the evidence in this case is concerned, never been in any trouble in his life." T. 426. Petitioner's case would have been supplemented only to the extent of a declaration of maternal love from a woman whose own background and conduct was far from ideal.[8]

In sum then, the Court must conclude that the evidence available to petitioner was in fact much as Mr. Leaphart believed. Some favorable testimony could probably have been adduced, but any good impact would surely have been at best much obviated by unfavorable information which would also have been revealed. Mr. Leaphart balanced these factors and determined that petitioner was best served by retaining closing argument and then exercising this privilege unencumbered by evidence of petitioner's prior misdeeds. This decision may or may not have been "right." Certainly, if the test is the jury's ultimate decision, it was not. But, this Court cannot say that it amounted to error of constitutional dimensions. I cannot conclude that petitioner was not afforded "reasonably effective" assistance of counsel.

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[8] Similarly, the Court notes that the affidavits supplied by the petitioner do contain references to a difficult childhood which might have created some sympathy for Mr. Burger. However, there are also many details which would support inferences extremely unfavorable to his cause. Thus, one hometown associate refers to "when Chris got into trouble and was on juvenile probation." Affidavit of Phyllis Russell. Another states that "[s]ometimes he would be a nice, normal guy, then at times he would flip out and would get violent over nothing." Affidavit of Earnest R. Holtsclaw. Another refers to possible serious drug abuse. Affidavit of Ruth Alson.

(3)

There remain before this Court only two allegations of error, each relating exclusively to the sentencing trial, or, more accurately, retrial. Petitioner first attacks the jury's finding that the offense was "outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1b(7). Petitioner contends in particular that this provision is too broad and vague to channel jury discretion adequately and further that, in reviewing petitioner's sentence, the Georgia Supreme Court failed to supply a limiting construction which might have met the problem of overbreadth as applied to the present facts.

Of course, this argument is derived from the Supreme Court decision in *Godfrey v. Georgia*, 446 U.S. 420 (1979). In *Godfrey* the court did indeed find the errors petitioner claims here with respect to b(7). However, it is obvious from the analysis employed by the Court that b(7) is not to be considered unconstitutionally vague in all circumstances. In fact, the plurality opinion finds it unconstitutional only as applied to the particular facts in question and only then after an analysis of limiting definitions which had been or might have been used with respect to b(7).

Of particular interest here is the Supreme Court's view of the standard applied by the Georgia Supreme Court to b(7) cases prior to 1977:

> [T]he Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the (b)(7) aggravating circumstances. The first was that the evidence that the offense was 'outrageously or wantonly vile, horrible or inhuman' had to demonstrate torture, depravity of mind, or an aggravated battery to the victim. The second was that the phrase 'depravity of mind' comprehends only the kind of mental state that led the murderer

> to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word 'torture' must be construed in para materia with aggravated battery' so as to require evidence of serious physical abuse of the victim before death.
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> 446 U.S., at 431 (Stewart, JJ.).

Thus, while *Godfrey* is hardly a model of clarity, it appears that the plurality opinion at least implicitly approves sentencing reviews which can be said to apply this limiting standard. It appears also that, if petitioner's crime can be said to fall within these parameters, no constitutional error is to be found in the jury's determination that b(7) was satisfied. Of course, the present case involves many circumstances which may readily be seen as involving "torture" and reflecting "depravity of mind." There was ample evidence upon which the jury might have found that petitioner aided and abetted in Stevens' sodomizing the victim prior to his death. Serious sexual abuse has been equated with "torture" under Georgia law. *House v. State*, 232 Ga. 140 (1974). Similarly, serious physical abuse can readily be seen in the confining of the victim in the car trunk for a period of hours, bound, nude and certainly anxious in the extreme over his captors' intentions. Likewise, there can be little argument but that petitioner's sadistic inquiry into Private Honeycutt's condition prior to submerging the taxi well-demonstrated "depravity of mind" and, further, that the victim's horror as the trunk inexorably filled amounted to "torture." Certainly, there is little similarity between the circumstances of this crime and the "domestic murders" considered by the Supreme Court in *Godfrey*.

This Court concludes that the evidence here readily supported the jury's finding of aggravating circumstance b(7). Likewise, there can be no doubt that there was evidence sufficient to support the jury's finding with

respect to the two remaining aggravating factors, *i.e.*, that it was committed in the course of other capital crimes, namely, kidnapping and armed robbery. However, the Georgia Supreme Court nonetheless found error in the trial court's charge with respect to these factors. *Burger v. State*, 245 Ga. 458 (1980). Noting that the jury instructions had included no description of the elements of kidnapping and armed robbery, the Georgia court held that

> [w]here a defendant in a capital case is not charged during the guilt-innocence phase with the capital felony designated as an aggravating circumstance, the trial court would be required to charge the definition of that capital felony as part of its instruction to the jury during the sentencing phase of the trial, unless such charge has been waived.
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> 245 Ga., at 461.

The Georgia Supreme Court also noted that the trial judge referred to kidnapping as a capital crime, without adding that this is true only where there is bodily injury to the victim or the crime is for ransom.

The Georgia Supreme Court thus found that the jury's determination with respect to these two factors was flawed. Nonetheless, the Court held that petitioner's death sentence need not be reversed because b(7) had been properly charged and found:

> Where two or more aggravating circumstances are found by the jury, the failure of one circumstance, or in this case two, does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon . . . the verdict may be upheld upon this ground and the failure to properly charge the other aggravating circumstances does not render the jury's verdict invalid.
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> 245 Ga., at 462.

This Court is, of course, bound by interpretation of state law from the Georgia Supreme Court. *Sandstrom v. Montana*, 442 U.S. 510, 516 (1979). Thus, it is established that the trial court in petitioner's case did indeed fail to follow the state capital punishment statute properly. However, the Georgia court's further conclusion that this finding did not necessitate reversal of petitioner's sentence raises significant constitutional issues that this Court must review independently. In particular, the Court must consider here whether the jury which handed down the death penalty was sufficiently guided in its deliberation to comply with the constitutional standard set forth first in *Furman v. Georgia*, 408 U.S. 238 (1972).

Petitioner argues that the jury's verdict was based upon all three aggravating factors. Thus, it is contended that there is no way to determine to what degree the jury was influenced by the erroneous instructions. Petitioner relies here primarily upon the holding of the Fifth Circuit in *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980). In *Stephens*, the jury had considered four possible aggravating factors, and found three in fact present. On this basis, the jury returned the death penalty. However, the Georgia Supreme Court subsequently held that one of these factors, relating to defendants "having a substantial history of serious assaultive criminal convictions" was unconstitutionally vague. Ga. Code Ann. § 27-2534.1(b)(1). *Stephens v. State*, 237 Ga. 259 (1976). The Georgia court nonetheless found the sentence valid based upon the same logic applied to petitioner here.[9] In *Stephens*, the Fifth Circuit reversed. The Court began its analysis by noting prior Supreme Court opinions which established that, if a jury is instructed to consider several grounds for conviction, one of which later proves to be unconstitutional, and the

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[9] *Burger v. State* cites as authority for the conclusion here under review the case of *Stephens v. Hopper*, 241 Ga. 596 (1978).

reviewing court cannot determine thereafter whether improper grounds were relied upon, the verdict must be set aside. *Stranberg v. California*, 283 U.S. 359, 367-68 (1931). *Accord*, *Bachellor v. Maryland*, 397 U.S. 564, 570-71 (1970); *Street v. New York*, 394 U.S. 576, 585-88 (1969); *Yates v. United States*, 354 U.S. 298, 311-12 (1957).

The Court further observed that this principle applied with particular forces to capital cases. The Court thereby noted that under *Furman* the death penalty cannot be imposed under "sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner." 631 F.2d, at 406. Instead, the Constitution demands that a jury's discretion be channelled by objective standards which "make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (opinion of Stewart, Powell, and Stevens, JJ.).

Applying these considerations to the facts in *Stephens*, the court concluded that the jury's discretion had not been adequately directed and further that the resulting sentence was not subject to "rational review" as constitutionally required. The Court based this holding upon several grounds. First, it seemed at least possible that jurors would have found the factors properly before it insufficient to support the death penalty without the presence of the third, unconstitutional bases. Second, the court found that the presence of the third aggravating factor enabled the jury to consider prior convictions which would otherwise not have been before it.[10] Third,

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[10] The Court must point out that in *Gregg* the plurality expressed the following views on the scope of the evidence to be considered in the sentencing procedure:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. See, *e.g.*, *Brown v. State*, 235 Ga. 644 (1975). So long as the evidence introduced and the argument at the pre-

the court found that the presence of this improper factor may have directed particular attention to the defendant's prior convictions. The court thus concluded that

> [i]t cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.
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> 631 F.2d, at 406.

Respondent has opposed application of this analysis on several grounds. It is contended first that *Stromberg* and other cases relied upon by the *Stephens* panel are inapposite because each involved a general verdict. In the present instance, any one aggravating factor would be sufficient to support the jury's verdict. Thus, it is contended that as long as one factor remained valid, there was no basis for reversal. Second, respondent points out that in *Stephens* the court considered an unconstitutional aggravating factor, whereas the present case relates only to an incomplete charge. Respondent also finds indications that the Supreme Court sees no problem in this area in several recent actions. Respondent relies particularly on the denial of certiorari in *West-*

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sentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

428 U.S., at 203-4 (Stewart, Powell, and Stevens, JJ.). In *Brown*, the Georgia Supreme Court notes that "evidence of general bad character could be admitted in those cases when the defendant had been notified prior to trial that such evidence would be presented." 235 Ga., at 649. Included as permissible evidence of bad character were "prior criminal convictions, and pleas of guilty or pleas of nolo contendere. . . ." 235 Ga., at 648. Thus, it appears that prior convictions could have been placed before the jury even in the absence of the unconstitutional aggravating factor. It further appears that under *Gregg*, no constitutional problem is thereby created. See also 428 U.S., at 163-164.

brook v. Balkcom, —— U.S. ——, 28 Crim.L.Rptr. 4087-88, decided November 17, 1980. *Westbrook* involved a defendant sentenced to death pursuant to a finding of b(7) and one other aggravating factor. Dissenting from the denial, Justice White specifically opined that "[t]he imposition of the death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either *Stromberg v. California* or *Street v. New York*." (dissenting opinion). Similarly, Justice Stevens wrote that the Georgia Supreme Court's view was "consistent with the Court's decisions." (concurring opinion).

Respondent's arguments are not without force. At the least, some significant support for the position of the Georgia court has been located on the United States Supreme Court. However, it is obviously true also that these are the views of only two justices, and further that their position is counterbalanced by Justice Stewart who supports and even expands the *Stephens* rationale:

> Georgia law would prohibit a further finding that the error was harmless simply because of the existence of the other aggravating circumstance. Under Georgia's capital sentencing scheme, the trial court is the sentencing authority. Ga. Code Ann. §§ 27-2503(b), 27-2534.1(b). In addition, the sentencer has the power to decline to impose the death penalty even if it finds that one or more aggravating circumstances are present.
>
> —— U.S. ——(1980).

Furthermore, it does not appear that respondent's remaining arguments can be given significant weight. *Stephens* does involve an aggravating factor which was found to be unconstitutionally vague on its face. However, the Georgia statute itself was approved only insofar as it was applied properly. *Gregg v. Georgia*, 428 U.S. 153, 198 (1975) (Stewart, Powell, and Stevens, JJ.).

Thus, the failure to adequately adhere to its strictures would appear to amount to error of constitutional dimensions in the present case and, indeed, generally. *Gregg* seems to leave no "gap" between constitutional and statutory error. At the least, constitutional error would certainly develop where error under state law created the "substantial risk" of the arbitrariness, which was prohibited by *Furman* and found present in *Stephens*.

Similarly, the distinction between general and special verdicts in the peculiar context of capital punishment avails respondent little. The Georgia statute does require a specific finding of aggravating circumstances, but the jury is, of course, free to decline to impose death even where such aggravation is present. Thus, the removal of a specific factor would not vitiate a finding of other factors, but it might well alter a jury's ultimate determination of death, which is after all the subject of appellate review. While the jury may be seen as returning a special verdict as to the presence or absence of particular circumstances, its ultimate determination of death is nonetheless general because it is not dictated by these factors, but only *permitted* under them. This Court concludes then that, even in the absence of *Stephens*,[11] the important question is not whether the jury *could* have imposed death without the improper charge, but whether it in fact *did* impose sentence based in some part on this consideration. More particularly, the Court must consider whether "substantial risk" of unguided discretion was created and whether "rational" appellate review was thereby precluded.

The present case is certainly not identical to *Stephens*, but the facts here point to no different result. The Court notes first that the lone remaining factor, b(7), has been specifically criticized for the at best slight guidance

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[11] The value of *Stephens* as precedent is somewhat diminished by respondent's motion for rehearing and rehearing en banc. This motion was filed December 8, 1980.

which it provides for a sentencing jury. In *Godfrey*, b(7) is referred to as creating grave risk of "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically unstructured jury." (Stewart, Blackmun, Powell, Stevens, JJ.). To be sure, there is no holding that b(7) is unconstitutional *per se*. But, nonetheless, the fact that the sole proper instruction received by the jury related to this admittedly quite vague factor can only heighten the Court's awareness of the danger of an unconstitutionally arbitrary sentencing decision.

Much more important, however, is the fact that the major thrust of Mr. Leaphart's closing argument was directed toward portraying Stevens as much the more active participant in the crimes which preceded the murder and provided the improperly charged aggravating factors. Such an argument is plainly not frivolous in view of the many Georgia cases which accord different sentencing treatment to a "triggerman" as against his accomplice, despite the fact that the technical legal status of each is the same. *See, e.g., Thomas v. State*, 246 Ga. 484 (1980). Obviously, an essential basis for considering the relative complicity of petitioner and Stevens in these crimes would be some definition of the precise legal elements of each. Full description of these crimes would surely have permitted a far more informed evaluation of the relative fault of petitioner and Stevens. Without such an explanation this Court cannot say whether the jury simply rejected the distinctions advanced by Mr. Leaphart or whether they were never properly considered because the jury lacked proper foundation for such a review. In many circumstances, the Court might be willing to resolve doubts such as these against petitioner. However, in a capital case especially, this Court is unwilling to label such doubts as insubstantial. I must conclude that a "substantial risk" of impermissible discretion was created by the trial court's charge. I must also

conclude that this risk makes "rational" review of the jury's decision impossible.[12]

Conclusion

The Court has herein considered a lengthy assemblage of alleged errors. These arguments are in overwhelming part insubstantial if not in fact frivolous.[13] It does not appear to this Court that petitioner's trial was in any significant way unfair. The Court most definitely finds no basis for concluding that Mr. Leaphart's representation was constitutionally inadequate. However, I do find that the sentencing phase of petitioner's trial was flawed in a way that may have prevented an informed process of jury deliberation and appellate review. Since it cannot be said that this possibility is not substantial, peti-

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[12] The Court notes also that there is basis in the trial record for believing that the jury's decision may have been a close one. In the first sentencing trial, the jury in fact returned after some period of deliberation to ask the trial court what parole chance the petitioner would have were he sentenced to life imprisonment. T. 438. Thus, it appears that there was some sentiment for not imposing the death penalty despite the obviously extreme nature of the crime and the equally obvious availability of aggravating factors to support such a result. At least, in the minds of this first jury, which was charged similarly to the second, T. 434, petitioner's does not seem to have been viewed as an "open and shut" case.

[13] This Court is particularly concerned by arguments raised with respect to ineffective assistance of counsel. I certainly do not question the wisdom or the propriety of advancing every legitimate argument on petitioner's behalf. However, many, if not all, the allegations made against Mr. Leaphart are directly contradicated by the record. Thus, they could not possibly be of any benefit to Mr. Burger. On the other hand, the raising of such unfounded charges must have a significant "chilling effect" on the willingness of experienced attorneys, like Mr. Leaphart, to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of trial counsel in light of this fact.

tioner must be remanded to the Superior Court of Wayne County for further proceedings not inconsistent with this opinion.

So Ordered this 29 day of April, 1981.

/s/ B. W. Edenfeld
Judge, United States District Court
Southern District of Georgia

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7419

CHRISTOPHER A. BURGER,
PLAINTIFF-APPELLEE, CROSS-APPELLANT

v.

WALTER A. ZANT, Warden,
Georgia Diagnostic and Classification Center,
DEFENDANT-APPELLANT, CROSS-APPELLEE

Oct. 13, 1983

Appeal from the United States District Court
for the Southern District of Georgia

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, District Judge.

VANCE, Circuit Judge:

The state of Georgia appeals the district court's grant of a petition for a writ of habeas corpus setting aside the death sentence of Christopher Burger.

The facts in this case are set out in the district court's opinion. *Burger v. Zant*, 513 F. Supp. 772, 788-89 (S.D. Ga. 1981). Briefly, Christopher Burger and Thomas Stevens, both soldiers at Fort Stewart, Georgia, were indicted for the murder of Roger Honeycutt, also a soldier. On September 4, 1977, Burger and Stevens decided to rob a taxicab driver. The victim, who supplemented his

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

military income by driving a taxi, picked up the two men. Burger and Stevens threatened Honeycutt with knives, forced him to stop the cab and robbed him of sixteen dollars. The victim was placed in the back seat of the cab with Stevens. As Burger drove the vehicle, Stevens forced Honeycutt to disrobe and then to participate in acts of oral and anal sodomy. The victim, nude and bound, was then placed in the trunk of the cab.

With Honeycutt still in the trunk, Burger drove the cab to the local airport, where he and Stevens met a friend and fellow soldier, James Botsford. As they drove back to Fort Stewart, Burger and Stevens explained what they had done, confirming their story by exchanging remarks with Honeycutt in the trunk. After some discussion, Botsford convinced his friends to promise to release Honeycutt unharmed. They dropped Botsford off at the post.

Burger and Stevens then drove to a nearby "borrow pit" which was filled with water. After removing their fingerprints from the cab and removing its radio, Burger raised the trunk and asked Honeycutt if he was all right. Honeycutt responded affirmatively. Burger then closed the trunk, started the car and drove it into the pond, jumping out as it entered the water. The victim died by drowning.

Christopher Burger was convicted of murder and sentenced to death. Stevens was tried separately, convicted, and also sentenced to death. *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978). On direct appeal to the Georgia Supreme Court, Burger's conviction was affirmed but his death sentence was vacated and the case remanded for resentencing. *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978).

On remand, Burger was once again sentenced to death and the sentence was affirmed by the Supreme Court of Georgia. *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980). The United States Supreme Court denied certiorari. 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980).

After unsuccessfully exhausting available state post-conviction remedies. Burger filed a petition for a writ of habeas corpus in federal district court. The district judge granted the writ insofar as it vacated Burger's death sentence.

The state of Georgia as appellant and Burger as appellee/cross-appellant raise five issues before this court: whether Burger was denied effective assistance of counsel; whether the jury instructions impermissibly shifted the burden of proof onto the defendant; whether *Miranda* violations occurred; whether the district court properly vacated Burger's death sentence where the jury instructions concerning two of the three aggravating circumstances upon which it was based were insufficient; and whether the jury instruction on the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) sufficiently channeled the discretion of the jury to impose the death sentence.[1] All of these questions were carefully analyzed in District Judge Edenfield's opinion. 513 F. Supp. at 788-803. As to the first three issues, we adopt Judge Edenfield's opinion as our own. The final two issues require discussion.

(1)

The *Stephens* Issue

Christopher Burger's sentencing jury based its death sentence upon three statutory aggravating circumstances: (a) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping"; (b) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery"; (c) the

[1] In addition, Burger challenges the sufficiency of the evidentiary hearing conducted by the district court. This contention is patently frivolous. The most cursory examination of the district judge's opinion demonstrates the care with which he treated the case and the seriousness with which he regarded the issues raised by Burger.

offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." On direct review, the Georgia Supreme Court held that the trial court had erroneously failed to instruct the jury on the definitions of kidnapping and robbery. The Georgia Supreme Court upheld the death sentence, however, based on the single remaining aggravating circumstance. *Burger v. State*, 265 S.E.2d at 800.

The district court vacated Burger's death sentence, holding that the Supreme Court of Georgia's disposition of the first two aggravating circumstances rendered the entire verdict invalid. The district judge based his decision on our opinion in *Stephens v. Zant*, 631 F.2d 397, *modified on panel rehearing*, 648 F.2d 446 (5th Cir. 1981),[2] and Burger and Georgia agree that *Stephens* controls this issue in the present case. Certiorari was granted in the United States Supreme Court in *Zant v. Stephens*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), *question certified to the Georgia Supreme Court*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222, *question answered*, 250 Ga. 97, 297 S.E.2d 1 (1982).

On June 22, 1983, the United States Supreme Court decided *Zant v. Stephens*, —— U.S. ——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), reversing the judgment rendered by a panel of the former fifth circuit. The Court held that under the Georgia capital punishment statute the invalidity of one of a plurality of statutory aggravating circumstances does not require that the entire death sentence be vacated. The Court found the death penalty in that case permissible because there were two remaining aggravating circumstances that "adequately differenti-

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) this circuit adopted as precedent all former fifth circuit cases submitted or decided prior to October 1, 1981. In *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the court held that Unit B panel or en banc court decisions of the former fifth circuit also are binding precedent in the eleventh circuit.

ate[d that] case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Id.* at ——, 103 S.Ct. at 2744. So long as "at least one of a plurality of aggravating circumstances found by the jury is valid and supported by the evidence," *Zant v. Stephens*, 456 U.S. 410, 414, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982), the death sentence may stand. We thus reverse the district court's order compelling resentencing based on our opinion in *Stephens*.

(2)

The *Godfrey* Issue

Burger also challenged the adequacy of the trial court's charge on the sole remaining aggravating circumstance that was applied in his case. Under Ga.Code Ann. § 17-10-30(b)(7), a jury may impose the death penalty if it finds that the defendant's crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Since "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery," *Gregg v. Georgia*, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976), the potential subjectivity of § (b)(7) has made it the target of numerous constitutional challenges. Although the Supreme Court ruled that § (b)(7) was not unconstitutional on its face in *Gregg*, the Court conceded that the statutory language might be subject to abuse if the Georgia Supreme Court were to adopt "an open-ended construction" of its terms. *Id.* Four years later, the Court re-examined the operation of § (b)(7) in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct 1759, 64 L.Ed.2d 398 (1980), and concluded that the Georgia courts had strayed from the straight and narrow path marked out in *Gregg*. In *Godfrey*, there was no allegation that the murders committed by the defendant involved either torture or an aggravated battery, and the

sentencing jury based its imposition of the death penalty on the simple grounds "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court upheld the sentence on review, but the Supreme Court reversed. Writing for a plurality of the Court, Justice Stewart held that the jury's findings were an insufficient basis for imposing the death penalty, because "nothing in these few words, standing alone . . . implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.* at 428, 100 S.Ct. at 1765. Although Justice Stewart found that the Georgia Supreme Court in *Godfrey* had ignored its responsibility "to keep § (b)(7) within constitutional bounds," *id.* at 429, 100 S.Ct. at 1765, he noted that other decisions by that court had placed a limiting construction on the statute that was sufficient to bring § (b)(7) within the ambit of constitutional acceptability:

> The *Harris* [*v. State*, 237 Ga. 718, 230 S.E.2d 1] and *Blake* [*v. State*, 239 Ga. 292, 236 S.E.2d 637] opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id. 446 U.S. at 431, 100 S.Ct. at 1766. As long as the Georgia courts observed these precedents, Justice Stewart suggested, death sentences imposed on the basis of

§ (b)(7) would meet the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

In the present case, the trial judge charged the jury that one of the bases for imposing the death penalty was a finding "that the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture and depravity of mind." Burger contends that this was insufficient to provide adequate guidance to the jury, and asserts that the trial court was required under *Godfrey* to explain and limit the meaning of § (b)(7) in accordance with the construction of the statutory language and Georgia case law presented by Justice Stewart in the plurality opinion.[3] The district

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[3] We note in passing that Burger did not object to the (b)(7) instruction at the resentencing hearing. This does not bar review of the issue under the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.E.2d 594 (1977), however, for either of two reasons. First, we address the issue because the Georgia Supreme Court ruled on its merits. *Burger v. State*, 265 S.E.2d at 799-800. This court recently observed that "[c]onsiderations of comity and federalism have resulted in the development of a well-settled exception to the procedural default rule of *Sykes*: where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable." *Booker v. Wainwright*, 703 F.2d 1251, 1255 (11th Cir. 1983). Because in the present case the Georgia Supreme Court "entertained the federal claims on the merits, a federal habeas court must also determine the merits of appellant's claim." *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n.9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 196 (1975). *See also County Court v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979); *Francis v. Henderson*, 425 U.S. 536, 542 n.5, 96 S.Ct. 1708, 1711 n.5, 48 L.Ed.2d 149 (1976); *Westbrook v. Zant*, 704 F.2d 1487, 1491 n.6 (11th Cir. 1983); *Henry v. Wainwright*, 686 F.2d 311, 313 (5th Cir. Unit B 1982), *on remand from* 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982); *Machetti v. Linahan*, 679 F.2d 236, 238 n.4 (11th Cir. 1982); *Washington v. Watkins*, 655 F.2d 1346, 1368 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); *Sasoon v. Stynchcombe*, 654 F.2d 371, 374 (5th Cir. 1981); *Moran v. Estelle*, 607 F.2d 1140, 1142-43 (5th Cir. 1979);

court did not expressly address the issue of whether a limiting construction was required at the sentencing phase, but two recent decisions of this circuit have rejected the argument that *Godfrey* requires the trial court to supply additional definitions or a limiting instruction in its charge to the jury. *See Westbrook v. Zant*, 704 F.2d 1487, 1501, 1504 (11th Cir. 1983); *Stanley v. Zant*, 697 F.2d 955, 971 (11th Cir. 1983).

The facts of *Stanley* in particular have some similarity to those in this case. Ivon Ray Stanley and his codefendant robbed their victim at gunpoint, then compelled him to accompany them to a wooded area where they beat and shot him before burying him alive. At the sentencing phase of Stanley's trial, the judge charged the jury in terms that were essentially identical to those employed by the trial court in the present case, instructing them that they could impose the death penalty if they found that Stanley's offenses were "outrageously and wantonly vile, horrible and inhuman, in that the offenses involved Defendant's depravity of mind and torture to the victim." *Stanley*, 697 F.2d at 971-72. The jury found that Stanley's offense "involved depravity of mind and torture to the victim" and sentenced him to death. *Id.* This court distinguished *Stanley* from *Godfrey* on the grounds that the charge used in the former (as well as in this case) required the jury to find that the crime involved both torture *and* depravity of mind, whereas the formulation used by the trial judge in *Godfrey* was phrased in the disjunctive language of the statute and permitted the jury to sentence the defendant to death on

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Cannon v. Alabama, 558 F.2d 1211, 1216 n.12 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).

Second, the state has not raised the procedural default issue and thus it must be deemed waived. *See Goode v. Wainwright*, 704 F.2d 593, 596 n.1, 612 n.25 (11th Cir. 1983); *Washington v. Watkins*, 655 F.2d at 1368; *Smith v. Estelle*, 602 F.2d 694, 708 n.19 (5th Cir. 1979), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1980); *LaRoche v. Wainwright*, 599 F.2d 722, 724 (5th Cir. 1979). *Cf. Lamb v. Jernigan*, 683 F.2d 1332, 1335 n.1 (11th Cir. 1983) (state waives exhaustion requirement by failing to raise it).

finding that the crime evidenced either torture or depravity of mind or an aggravated battery.[4] The jury's findings in *Godfrey* did not make it apparent which, if any, of these factors it had relied on in sentencing the defendant to death, and the absence of any evidence suggesting that the defendant had tortured or physically abused his victims before their deaths led Justice Stewart to conclude that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. In contrast, the instructions given the *Stanley* and *Burger* juries prevented them from imposing the death sentence unless they found that the victims had in fact been tortured before death. Since the jurors in each of these cases made an explicit finding that torture had occurred, we cannot say that their reasons for imposing the death penalty must remain "the subject of sheer speculation." *Id.* at 429, 100 S.Ct. at 1765. The only remaining questions are first, whether there was anything about the instructions as given that might have led the jurors to base their sentence on a mistaken interpretation of state law, *see Sandstrom v. Montana*, 442 U.S. 510, 517, 99 S.Ct. 2450, 2455-56, 61 L.Ed.2d 39 (1979), and second, whether the state law as applied in this case is constitutional.

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[4] The Georgia Supreme Court has stressed the importance of the fact that § (b)(7) is worded in the disjunctive, rather than the conjunctive. Thus, "[i]t is not required that a trier of fact find the existence of each disjunctive phrase in the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute." *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, 320 (1980). Although the trial judge's charge in *Godfrey* was therefore technically correct, the jury returned a report that did not specify which, if any, of the phrases in the second clause was the basis of its death sentence. In addition, the potential subjectivity of the phrase "depravity of mind" renders a death sentence that is based upon that phrase alone more suspect than one that is based on both "depravity of mind" and one of the other factors as well. *See* note 5 *infra*.

Burger contends that the trial judge's instructions in his case were defective because they did not set forth Justice Stewart's construction of the Georgia law from *Godfrey*. With regard to the first two points in Justice Stewart's analysis, however, Burger's objections are easily disposed of. Although the trial judge did not expressly specify that the jury could not find that a crime was "outrageously or wantonly vile, horrible or inhuman" without making a specific finding that it demonstrated "torture, depravity of mind, or an aggravated battery to the victim," the jury in this case—unlike the jury in *Godfrey*—returned a verdict that clearly revealed its understanding that the two clauses were interrelated. Burger also contends that the jury should have been instructed that it could nct find "depravity of mind" without finding that the defendant had tortured or physically abused the victim before his death. The trial judge in *Burger*, however, clearly linked "torture and depravity of mind" in his instructions, and the jury's verdict did likewise.[5]

Burger's final objection to the trial court's charge is somewhat more troublesome. He asserts that the jury should have been instructed that the word "torture" assumes the existenec of an aggravated battery and therefore requires evidence of serious physical abuse of the victim before death. In *Stanley* and *Westbrook*, this aspect of Justice Stewart's opinion was not problematic,

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[5] Our consideration today does not reach the situation presented by a charge of depravity of mind not involving torture or aggravated battery. That question is obviously a more difficult one in the light of *Gregg* and *Godfrey*. *Cf. Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983) (section (b)(7) charge stated in the disjunctive held not to require instruction in excess of statutory language). Contrary to the conclusion of Justice Stewart in *Godfrey*, the Georgia Supreme Court in a line of cases extending well before that opinion has upheld findings of depravity of mind based on such factors as age of the victim, physical characteristics of the victim and mutilation, disfigurement or sexual abuse *after* death. *See Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217 at 221.

since it was not disputed that in both of those cases the defendant had inflicted extreme physical abuse on his victim prior to the murder itself. *See Westbrook*, 704 F.2d at 1505 & n.18; *Stanley*, 697 F.2d at 972. In dictum, however, the *Stanley* court reflected that "[arguably], the undefined word 'torture' [might] fall[] short of meeting the [*Godfrey*] test because in a given case a jury might understand it to mean mental torture rather than a word to be read *in pari materia* with 'aggravated battery' to require evidence of serious physical abuse." *Stanley*, 697 F.2d at 972. There was no contention in *Stanley* that "the torture to which his victim was subjected was anything other than physical," *id.*, but the situation in the present case is far less clear. In *Burger*, the jury might have viewed the evidence that was presented in a number of different ways. The jury found that Burger had tortured his victim, and the evidence supports a finding beyond a reasonable doubt that Honeycutt was tortured before he died. There was sufficient evidence from which the jury may properly have concluded that Burger aided and abetted his codefendant Stevens in physically torturing Honeycutt, as well as that he personally tortured Honeycutt both physically and psychologically. On the other hand, it is also conceivable that the jury may have found that while Stevens physically tortured Honeycutt, Burger inflicted only psychological torture on him.[6] This case therefore requires us to

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[6] The district court's correct analysis of the evidence is as follows:

> Of course, the present case involves many circumstances which may readily be seen as involving "torture" and reflecting "depravity of mind." There was ample evidence upon which the jury might have found that petitioner aided and abetted in Stevens' sodomizing the victim prior to his death. Serious sexual abuse has been equated with "torture" under Georgia law. *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974). Similarly, serious physical abuse can readily be seen in the confining of the victim in the car trunk for a period of hours, bound, nude and certainly anxious in the extreme over his

answer the question which we raised but did not resolve in *Stanley:* whether there is any significant distinction between mental or psychological and physical torture under either the law of Georgia or the Constitution. If the latter is within constitutional limits but the former is not, *Sandstrom* requires that the jury must receive instructions to this effect.

The deliberate infliction of mental anguish certainly comes within the commonly understood meaning of the word "torture," [7] and the sole support which Burger offers for his argument that the court should hold differently is the language of Justice Stewart's plurality opinion in *Godfrey.* As an initial matter, it is important to emphasize that the *Godfrey* plurality's reversal of the death sentences imposed in his case ultimately stemmed not from its dissatisfaction with the jury instructions, but from its belief that the Georgia Supreme Court had failed to carry out its place in the statutory scheme given conditional approval in *Gregg.*

> In past cases the State Supreme Court has apparently understood this obligation of carrying with it the responsibility to keep § (b) (7) within constitutional bounds. . . . Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court

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captors' intentions. Likewise, there can be little argument but that petitioner's sadistic inquiry into Private Honeycutt's condition prior to submerging the taxi well-demonstrated "depravity of mind" and, further, that the victim's horror as the trunk inexorably filled amounted to "torture."

513 F.Supp. 798-99.

[7] In pertinent part, the definition of torture provided by *Webster's New Collegiate Dictionary* is as follows:

> 1: the infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure 2a: anguish of body or mind; agony b: something that causes agony or pain.

> can be said to have applied a constitutional construction of the [statute].

446 U.S. at 429, 432, 100 S.Ct. at 1765, 1767. Thus, the key inquiry in the minds of the *Godfrey* plurality was whether the Georgia Supreme Court had kept faith with its own expressed standards in reviewing the defendant's sentences of death. Justice Stewart found that it had not done so in *Godfrey*, basing this view on his construction of the Georgia statute and case law. He noted, however, that his research was limited to cases pre-dating 1978, and he conceded that the third of the "separate but consistent conclusions" which he deduced from the Georgia case law—the requirement that torture be construed *in pari materia* with "aggravated battery"—was derived from a single decision, *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977). The basis for Justice Stewart's conclusion was apparently the Georgia Supreme Court's statement that it "[c]onsider[ed] torture and aggravated battery on the one hand *as substantially similar treatment* of the victim and depravity of mind on the other hand as relating to the defendant. . . ." 236 S.E.2d 643 (emphasis added).

Although Justice Stewart's construction of the Georgia law on this point was strongly criticized at the time, *see, e.g., Godfrey*, 446 U.S. at 435-36, 100 S.Ct. at 1768-69 (Marshall, J., concurring in the judgment); 446 U.S. at 443, 100 S.Ct. at 1772-73 (Burger, C.J., dissenting); Donohue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death*, 30 *Cath.U.L.Rev.* 13, 44-47 (1980), the Georgia Supreme Court subsequently affirmed its adherence to his construction in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980), where the court noted that "[t]orture occurs when the victim is subjected to serious physical abuse before death." 268 S.E.2d at 345. The *Hance* court went on, however, to embrace an expansive definition of the term "serious physical abuse":

> Serious sexual abuse may be found to constitute serious physical abuse. [citation omitted] Torture also

> occurs when the victim is subjected to an aggravated battery as hereinabove defined. Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Id. Subsequent decisions by Georgia's highest court have reaffirmed its interpretation of "physical abuse" as including both sexual and psychological abuse as well. *See, e.g., Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217, 221 (1982); *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, 58 (1981).

Since the Georgia law therefore follows common usage in finding that the deliberate infliction of mental anguish constitutes "torture," we conclude that the trial court's failure to elaborate or define the term further does not run afoul of the rule in *Sandstrom*. In meaningful contrast to the more amorphous term "depravity of mind," "torture" has a readily understandable and generally understood meaning. This excludes a reasonable risk that the jury might give it an unintended interpretation.

We see no basis for concluding that the definition of "torture" applied by the Georgia courts violates substantive federal constitutional guarantees. The central theme of the Supreme Court's death penalty jurisprudence has always been that the states must draft and apply their capital punishment laws in a manner that "genuinely narrow[s] the class of persons eligible for the death penalty," *Zant v. Stephens*, —— U.S ——, 103 S.Ct. at 2742-43, thereby providing a "principled basis for distinguishing [a] case, in which the death penalty [is] imposed, from the many in which it [is] not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia Supreme Court has recently demonstrated that it will not allow the

category of psychological abuse to become all-inclusive.[8] In *Phillips v. State*, *supra*, the court emphasized that a finding of "serious psychological abuse" required a showing that "the defendant inflicted deliberate, offensive and prolonged pain on his victim prior to death." 297 S.E.2d at 221. Thus, "the mere apprehension of death, immediately before the fatal wounds are inflicted" was found insufficient to justify a finding of "torture" under § (b)(7). *Id.*

We therefore decide that a death sentence may constitutionally be imposed under § (b)(7) based on a finding that the defendant inflicted either psychological or physical torture upon his victim. We can discern no principled basis for attempting to distinguish the two, and it seems highly questionable that Justice Stewart meant to draw such a distinction in *Godfrey*. The standards applied by the Georgia courts certainly restrict the class of persons eligible for the death penalty by reason of the "torture" provision of § (b)(7), and the facts of this case easily place it within the core of those the statute was designed to reach. Burger's contentions must therefore be rejected.

Having concluded that both phases of Burger's trial are free of constitutional error, we reverse the judgment of the district court and remand with instructions that the writ be denied.

REVERSED and REMANDED.

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[8] Here, of course, as in *Zant v. Stephens*, our decision "depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." —— U.S. at ——, 103 S.Ct. at 2749.

JOHNSON, Circuit Judge, dissenting:

I concur in the majority's opinion except that, for the following reasons, I dissent from that part of the opinion adopting the district court's opinion and order, 513 F. Supp. at 795-98, denying Burger's petition for habeas corpus relief on the grounds that he was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments at both of his state court trials and on appeal to the Supreme Court of Georgia. A review of the record reveals that Burger was denied the effective assistance of counsel both by his appointed counsel's active representation of his co-indictee's conflicting interest and by his counsel's failure to present any evidence in mitigation at either of his two sentencing proceedings.

A review of the general principles applicable to all ineffective assistance of counsel claims is in order. The Sixth Amendment guarantees a criminal defendant the right to "*effective* assistance of counsel, that is, counsel reasonably likely to render and rendering effective assistance." *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en banc), *cert. granted*, —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). The appropriate methodology for determining whether there has been effective assistance of counsel is to examine the totality of circumstances in the record. *Baty v. Balkcom*, 661 F.2d 391, 394 (5th Cir. Unit B 1981). Although neither in capital nor in noncapital cases is defendant entitled to error-free counsel, the "number, nature and seriousness of the charges against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir. 1981).

Turning first to Burger's conflict of interest claim, in order to establish the constitutional predicate for ineffective assistance Burger must show that his counsel actively

represented actually conflicting interests. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980); *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983). Applying this standard to the facts of this case, the record is clear that Burger's counsel was actively representing both Burger and his co-indictee Stevens and that an actual conflict of interest between the two violated Burger's right to the effective assistance of counsel.[1]

First, it is apparent that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both Burger and Stevens were appointed counsel by the trial court at approximately the same time, and within a few weeks after they had been charged with the crime. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Leaphart and Smith discussed the issues involved in each case and researched the law together. Smith sat at counsel table and assisted Leaphart during Burger's trial. Although not physically present at Stevens' trial, Leaphart testified that "I worked then with—discussed the issues with Bob [Smith]. We researched the law together."[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he

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[1] The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Glasser v. United States*, 315 U.S. 60, 75, 62 S.Ct. 457, 464-65, 86 L.Ed. 680 (1942); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978).

[2] Transcript of Federal Habeas Corpus Hearing ("THC") at 18.

"primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one law firm represented both Burger and Stevens,[5] the

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[3] THC at 40-41.

[4] The warden-appellant argues that the conflict of interest cases relied upon by Burger are inapposite as involving the representation of multiple defendants by one attorney. Here, appellant contends, Burger and Stevens were represented by "separate" attorneys. This argument is contrary to the facts as reflected by the record. Leaving aside the fact that Leaphart and Smith were partners in the practice of law, the attorneys here were each active in the defense of the other's client and "seem to have viewed themselves as a defense 'team' acting on behalf of [both] of the accused." *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 515 (3d Cir. 1979), *rev'd on other grounds, Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart consulted confidentially with Stevens, aided in preparing his case for trial, and prepared the briefs for both of his appeals. "Whatever may have been the extent of each attorney's participation in the trial of the . . . defendants, we are satisfied that it was sufficient to establish that both attorneys represented [both] defendants." *Id.*

[5] "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir. 1980) (*quoting United States v. Helton*, 471 F.Supp. 397, 399 n.1 (S.D.N.Y. 1979)); *see also United States v. Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir. 1979) (ineffective assistance found where "[t]he law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the state prosecutor who tried Zuck."); Fed.R.Crim.Pro. 44(c) ("[w]henever two or more defendants have been jointly charged . . . and are represented by . . . retained or

end result on these facts is the same: Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[6] a finding of multiple representation alone does not establish ineffective assistance of counsel. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir.1975). The conflict must be shown to be actual, not speculative, before it will cause representation to fail Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d at 397. "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.'" *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.1979) (*quoting Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would "significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.").

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appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."), *construed in Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates its recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent co-defendants with conflicting interests."); *ABA Code of Professional Responsibility* DR 5-105(D). Further, the Supreme Court of Georgia, exercising its supervisory role over the Bar, has adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. *Fleming v. State*, 264 Ga. 90, 270 S.E.2d 185 (1980). This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Id.* at 188 n.7.

[6] *See Cuyler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("[a] possible conflict of interest inheres in almost every instance of multiple representation"); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978).

In this case, the fundamental issue, as perceived by counsel, was not that of guilt, but of culpability. Upon the habeas corpus hearing Leaphart testified at length concerning the evidence supporting Burger's lesser degree of culpability for the murder as compared to Stevens'.[7] Summarized, the evidence was that at the time the crime was committed Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In such a situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. An actual conflict of interest between Burger and Stevens is thus apparent. Stated differently, Burger's interests were drastically adverse to those of Stevens.

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to

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[7] THC at 20-23.

> the defendant to take some action that could be detrimental to his other client.
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> *Zuck v. Alabama*, 588 F.2d at 439.

The course of Burger's state court proceedings illuminates the duty owed him by Leaphart to take actions that could be detrimental to Stevens. First, Leaphart did not at any time in his representation of Burger offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom*, 661 F.2d at 397 n. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, 189 (1980) (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). Second, at Burger's trial Stevens was not called as a witness by the defense. If Stevens had been called by the state, Leaphart would

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[8] At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. THC at 38-39. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "*during the first trial* [the district attorney] refused to discuss it in any terms." THC at 65 (emphasis supplied). From this account, it appears that plea negotiations were entered into in this case; that Leaphart never offered Burger's testimony against Stevens; and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testifying against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no *pretrial* conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.

have been placed in the untenable position of cross-examining his own client. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c)(3) (1982), formerly Ga.Code Ann. § 27-2537(c)(3) (1933).

Once an actual conflict of interest is shown, without further inquiry, prejudice to the defendant is presumed. *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir. 1983). "It is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless." *Baty v. Balkcom*, 661 F.2d at 395 (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir. 1981)). The rationale for dispensing with the requirement of a showing of prejudice in conflict of interest cases "becomes apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone." *Johnson v. Hopper*, 639 F.2d 236, 239 (5th Cir. Unit B 1981). The degree to which counsel's strategic decisions and performance throughout the course of his representation are affected by an actual conflict of interest subtly pervading the whole of the defense may not be manifested in his conduct at trial alone. "[T]he sixth amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. The fact that a particular lawyer may actually resist the

temptation is of no moment." *Zuck v. Alabama*, 588 F.2d at 440.

In light of this precedent it is clear that the presumption of prejudice arising from an actual conflict of interest cannot be overcome by evidence that counsel did, in fact, vigorously pursue one client's defense to the detriment of the other at trial. Although the factual consent of the extraordinary circumstances in which the error of representing actually conflicting interests is considered harmless has not been delineated by this Court, it is apparent that a showing of no adverse effect upon counsel's performance at trial or no impairment of his client's defense does not constitute such a circumstance.

Thus, accepting the district court's findings, those findings having been adopted by the majority in this case, that Leaphart "in no way tailored his strategy toward protecting Stevens" at Burger's trial, and that the trial record "shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime," the presumption of prejudice from the actual conflict of interest between Burger and Stevens remains. Further, the actual conflict of interest between Stevens and Burger was not limited to Burger's trial, but permeated the entire course of Burger's state court proceedings. Once Burger established that an actual conflict of interest was present, whether at pretrial plea negotiations, trial or on appeal, and that his counsel actively represented both interests, his claim of ineffective assistance of counsel was complete.

I turn now to Burger's claim that he was denied the effective assistance of counsel because his counsel failed to present *any* evidence in mitigation, or otherwise, at either of his two sentencing proceedings. In *Stanley v. Zant*, 697 F.2d 955, 962 (11th Cir.1983) this Court rejected a claim that failure to present any mitigating evidence at the sentencing proceeding in addition to that presented at the guilt phase of the trial constituted per se ineffective assistance of counsel. Although, unlike

Stanley's attorney, Burger's attorney did not present *any* evidence during either the guilt or two sentencing phases, it is not necessary to articulate a per se rule of ineffectiveness in this case as "application of general principles governing effectiveness of counsel to the specific context of a capital sentencing proceeding," *id.*, demonstrates the ineffectiveness of Burger's counsel.

Counsel's duty of effective representation continues into the sentencing phase of his client's trial. *King v. Strickland*, 714 F.2d 1481, at 1491 (11th Cir.1983).

> The sentencing phase of any case regardless of the potential punishment, is 'the time at which for many defendants the most important services of the entire proceedings can be performed.' ABA Standard on Criminal Justice, Sentencing Alternatives and Procedures § 5.3(e). The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial. *Stanley v. Zant*, 697 F.2d at 963.

"At the heart of the duty of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). In *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) the en banc court delineated the content of this duty to investigate:

> A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those

> assumptions counsel need not investigate lines of defense that he has chosen not to employ at trial.
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> In sum, an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable. *Id.* at 1255, 1256 (footnotes omitted).

"An attorney may proceed absent a reasonable investigation into all potential lines of defense, but he does so at his peril." *Stanley v. Zant*, 697 F.2d at 966. Finally, once a showing of ineffective assistance of counsel due to counsel's failure to investigate has been made, the second prong of *Washington v. Strickland* requires that prejudice from this error be demonstrated. *Id.* at 1258.

The district court found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother. Although it is unclear what the content of those conversations, as relating to mitigating evidence concerning Burger's background outside of Wayne County, Georgia, and the identity of possible character witnesses, was found to be, the district court concluded that Leaphart made "adequate if hardly ideal inquiries," and that his "investigation appears to meet at least minimal professional standards." Clearly by no stretch of the imagination could Leaphart's investigation be characterized as reasonably substantial. Since Leaphart failed to conduct a reasonably substantial investigation into available mitigating evidence, in order to be effective his choice not to investigate must have been a reasonable strategic decision based upon reasonable assumptions. Three reasonable assumptions on which Leaphart's strategy not to substantially investigate available mitigating evidence have been proffered: 1) that Leaphart's theory of defense, or strategy, was to make

the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before, an argument which would have been undercut by an investigation into Burger's background. None of these strategies, and the assumptions on which they are based, withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District Attorney prove his case. And my theory of defense was to—well, that in effect, in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.[9]

And, specifically concerning the second trial solely on the issue of penalty, Leaphart again testified that he "[f]elt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts." [10] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but instead reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all, and reliance on such a strategy, especially in the context of a capital sentencing proceeding, as an alternative to substantially investigating available mitigating evidence is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve

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[9] THC at 18.

[10] THC at 52.

his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. § 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. § 27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir.1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.

The district court found that Leaphart's failure to substantially investigate available mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding argued Burger's lack of culpability as compared to Stevens', and concluded with the plea for mercy. Neither argument would have been undercut by the presentation of humanizing evidence concerning Burger's background.

In conclusion, Leaphart's decision not to substantially investigate available mitigating evidence was not a reasonable strategic choice, and thus his failure to investigate constituted ineffective assistance of counsel.

The inquiry does not end with a finding of ineffective assistance. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Washington v. Strickland*, 693 F.2d at 1258. Under any standard, in this case prejudice is apparent. *See Douglas v. Wainwright*, 714 F.2d 1532 at 1556-58 (11th Cir.1983).

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. Summarized, this evidence was that Burger's parents had been married when his mother was fourteen and his father was sixteen. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida his stepfather told him he could not stay with them. Burger's mother told the juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

It is absolutely astounding to me that none of this evidence was ever presented to Burger's juries. The district court found that although the affidavits of the character witnesses supplied by Burger at the hearing

do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not what Leaphart assumed without investigating, that Burger was a good boy and went to church, but that Burger's personality and motivation could be explained by his stormy and unhappy childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case," Leaphart failed to make a substantial investigation into its use. *Stanley v. Zant*, 697 F.2d at 969. Leaphart testified that "[I] did not have any knowledge of any witnesses that—potential witnesses that I thought would have benefited him. Had I known or had knowledge of any, I would—certainly would have used them."[11] The prejudice to Burger from counsel's failure to substantially investigate available mitigating evidence and present it at either of his capital sentencing proceedings lies in the alternative chosen by counsel: to present no evidence at all. On the basis of the state's case alone, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Washington v. Strickland*, 693 F.2d at 1263-62, showing that "the petitioner suffered actual and substantial detriment to the conduct of his defense."

For these reasons, I would REVERSE the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and REMAND this case to the state court for a trial with Burger being represented by conflict-free and competent counsel.

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[11] THC at 44.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7419

CHRISTOPHER A. BURGER, PETITIONER-APPELLEE,
CROSS-APPELLANT

v.

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center, RESPONDENT-APPELLANT,
CROSS-APPELLEE

Feb. 5, 1985

Appeals from the United States District Court
for the Southern District of Georgia

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

Our previous consideration of the merits of this case resulted in reversal of the district court's grant of a writ

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama sitting by designation.

of habeas corpus setting aside petitioner's death sentence. *Burger v. Zant*, 718 F.2d 979 (11th Cir.1983). In reaching our decision we adopted the district court's opinion, *Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga.1981), with respect to three issues, including Burger's claim that he had been denied effective assistance of counsel.

The Supreme Court granted certiorari limited to one aspect of that issue, *i.e.*, Burger's claim that his trial counsel failed to investigate, prepare or present evidence for the sentencing phase of his capital trial. The Court concluded that the district court had apparently made a mistake in assessing the evidence on that aspect of the ineffectiveness of counsel issue. *Burger v. Zant*, —— U.S. ——, 104 S.Ct. 2652, 81 L.Ed.2d 360 (1984). It therefore vacated and remanded to this court for reconsideration, particularly in light of *Strickland v. Washington*, 466 U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). —— U.S. at ——, 104 S.Ct. at 2653.

This court retained jurisdiction but remanded to the district court instructing it to extend or revise its findings and, if appropriate, its conclusions and judgment. *Burger v. Zant*, 741 F.2d 1274 (11th Cir.1984). On remand the district court reexamined Burger's claim and on October 10, 1984, entered its order holding the same to be without merit. A copy of the district court's order is made an appendix to this opinion. Following entry of the district court's order we allowed counsel to supplement their prior briefs.

Upon reconsideration, we again adopt the appended order of the district court as our own opinion.

Our previous reversal of the district court's grant of the writ was based on the so called *Stephens* issue. 718 F.2d 981, 982. That issue is no longer before us. On the issue presently before us we affirm the district court's holding that Burger's petition is without merit. Accordingly, we again remand to the district court with instructions that the writ be denied.

REMANDED with instructions.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

CV280-114

CHRISTOPHER BURGER, PETITIONER

v.

WARDEN ZANT, ET AL., RESPONDENTS

ORDER

On limited remand from the Eleventh Circuit Court of Appeals, this Court has before it the task of examining petitioner Christopher Burger's claim that he received ineffective assistance of counsel at his second capital sentencing trial. At that trial, petitioner received a sentence of death.

I. *Background*

Mr. Burger's crimes, trials, appeals and habeas corpus proceedings are detailed elsewhere in the record of this case. *See Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978) (murder conviction affirmed, sentence vacated, case remanded for resentencing), *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980) (death sentence affirmed), *cert. denied*, 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980), *Blake v. Zant*, 513 F.Supp. 772, 787-803 (S.D.Ga.1981) (writ denied as to conviction but granted as to death sentence), *rev'd*, *Burger v. Zant*, 718 F.2d 979 (11th Cir.1983), *rehr'g en banc denied*, 726 F.2d 755 (11th Cir.1984), *vacated*, *Burger v. Zant*, —— U.S. ——, 104 S.Ct. 2652, 81 L.Ed.2d 360 (1984) (remanded with instructions), *Burger v. Zant*, 741 F.2d 1274 (11th Cir.1984) (limited remand to district court).

Previously, this Court concluded, *inter alia*, that petitioner was not denied effective assistance of counsel at his second sentencing trial. The Eleventh Circuit affirmed this Court as to this issue and adopted this Court's opinion as its own. *Burger v. Zant*, 718 F.2d at 981. On appeal, the United States Supreme Court vacated the opinion of the Eleventh Circuit and instructed it "to reconsider the effectiveness of counsel's assistance at petitioner's second sentencing and for further consideration in light of *Strickland v. Washington*, 466 U.S. —— [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984)." 466 U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Supreme Court also noted that this Court may have mistaken the first sentencing transcript for the second sentencing transcript when it considered the reasonableness of counsel's decision not to present character evidence to the resentencing court.

Thereafter, the Eleventh Circuit remanded the case to this Court, with instructions to "address the matter to which specific reference was made by the Supreme Court[.]" 714 F.2d at 1275. The court of appeals also stated that this Court "is not limited to that question and shall make such findings as it deems appropriate in light of the Supreme Court's action." *Id.* at 1275.

II. *Conclusion*

In its original decision, this Court examined petitioner's "ineffective assistance" argument and enumerated six claims meriting discussion. 513 F.Supp. at 795. In light of the standards announced in *Washington*, this Court affirms its earlier decision as to claims two through four, as well as claim six; they provide no grounds for habeas relief. Claim one will be reexamined *infra*.

A. *Failure to Present Mitigating Evidence*

Turning to petitioner's fifth claim—that his counsel was ineffective because he failed to present mitigating

evidence to the sentencing jury—the Court reviews the standards articulated in *Washington, supra*, and *United States v. Cronic*, —— U.S. ——, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984). In *Washington*, the Supreme Court

> [e]stablished a two-prong test for analyzing . . . [ineffective assistance] challenges. First, the defendant must establish that his counsel's performance "fell below an objective standard of reasonablness." *Id.* at ——, 104 S.Ct. at 2065. Once that threshold is crossed, the defendant must then demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at ——, 104 S.Ct. at 2068.

Green v. Zant, 738 F.2d 1529, 1536 (11th Cir.1984) (hereafter, *Green*); *see also Smith v. Wainwright*, 741 F.2d 1248 (11th Cir.1984); *Douglas v. Wainwright*, 739 F.2d 531, 533 (11th Cir.1984); *Boykins v. Wainwright*, 737 F.2d 1539 (11th Cir.1984); *Solomon v. Kemp*, 735 F.2d 395 (11th Cir.1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]." *Boykins*, at 1543; quoting *Washington*, 104 S.Ct. at 2068. "Furthermore, a defendant must satisfy both the performance and prejudice prongs to successfully demonstrate an ineffective assistance claim. [*Washington*], at ——, 104 S.Ct. at 2069. *Chadwick v. Green*, 740 F.2d 897, 900 (11th Cir.1984) hereafter, *Chadwick*.[1] Courts need not address both of these com-

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[1] "In [*United States v.*] *Cronic*, [—— U.S. ——, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)], the Court carved out a narrow exception to *Washington's* general rule that a defendant must demonstrate prejudice: a showing of prejudice is not necessary if there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' —— U.S. at ——, 104 S.Ct. at 2046; *see also Washington*, 466 U.S. at ——, 104 S.Ct. at 2065." *Chadwick*, 740 F.2d at 900. Examples of presumed prejudice would include cases where counsel was denied the right of effective cross-examination or where the defendant

ponents "if the defendant makes an insufficient showing on one." *Washington*, 466 U.S. at ——, 104 S.Ct. at 2069, 80 L.Ed. at 699.

In addition, the *Washington* court emphasized that "a substantial burden of proof rests on a defendant who advances such a claim; the challenged proceeding enjoys a 'strong presumption of reliability.' *Id.* at ——, 104 S.Ct. at 2069." *Boykins*, at 1543.

Finally, the Eleventh Circuit noted in *Green* that its

> [o]wn cases have established that '[e]ffective assistance does not mean errorless assistance, nor counsel judged ineffective by hindsight,' *Goodwin v. Balcom*, 684 F.2d [794,] 804 [(11th Cir.1982)], and our determination of whether petitioner was denied effective assistance 'must be based on the totality of circumstances in the entire record rather than on specific actions.' *United States v. Gibbs*, 662 F.2d 728, 730 (11th Cir.1981). Thus, even if we agree that any of petitioner's complaints against his counsel is well founded, this does not necessarily mean that constitutionally ineffective assistance has been established.

738 F.2d at 536.

In its original Order, this Court did review the resentencing record but erroneously cited to the transcript of the first sentencing trial. Accordingly, the Court will again review the second sentencing transcript.

As he did at the first sentencing trial, attorney Alvin Leaphart decided not to direct the jury's attention to character-oriented mitigation evidence at petitioner's second sentencing trial. (Federal Habeas Hearing Record, hereafter, "R." 34, 73). Although he was aware of the fact that Georgia permits a broad scope of mitigating evidence to be admitted at capital sentencing trials (R. 34, 36), it was Leaphart's judgment "that the best approach was . . . to argue the difference in [age between

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was denied counsel at a critical stage of the trial. *Id.* No such exception is evident in the instant case.

Burger and accomplice Thomas Stevens, as well as] the difference in their participation in the crime." (R. 34). In addition, he sought to "make the District Attorney prove his case[,]" (R. 18) by using the rules of evidence "to prevent [the prosecution] from doing so." (R. 18). The trial record reflects this strategy. *See, e.g.*, Tr. 65, 67, 95-6, 106-7, 109, 111, 117, 136, 180-181, 185-191.

Apparently in recognition of the range of evidence the State is permitted to present at sentencing trials (*see* note 6 *infra*), in addition to the strength of the evidence against his client, Leaphart decided to rely primarily on his closing argument to the jury. In his argument, Leaphart illuminated the acts of co-indictee Stevens [2] and minimized Burger's involvement in the murder and related crimes. He fully emphasized the fact that Stevens was twenty years old at the time of the crime, while Burger was only seventeen; that Stevens, the chief architect of the crimes, had considerable influence over petitioner. (Tr. 251, 253). He enumerated, as he did at the first sentencing trial, the series of criminal acts committed by Stevens in contrast to the relatively fewer acts committed by Burger, who "was only following Stevens." (Tr. 250-255).

Next, Leaphart attempted to stimulate the jurors' religious sensitivities. (Tr. 256). He also argued that an "eye for an eye" was a notion popular with the people of Moses and of the old testament, but not with the people of today.[3] (Tr. 257-258).

Leaphart concluded his closing argument by re-emphasizing the contrast between the acts of Stevens and Burger, then asking the jury "[w]hat would Jesus Christ do if he were sitting in our shoes today?" (Tr. 259).

The outline above reflects the best strategy Leaphart felt was available to him. Interviews with Burger (R.

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[2] Stevens and Burger were tried separately.

[3] The obverse side of this coin was applied by the prosecutor in *Cape v. Francis*, 741 F.2d 1287, 1301 n.15 (11th Cir. 1984).

37), Burger's mother (R. 37, 44) and an attorney who had befriended Burger and his mother (R. 44), in addition to his consultation with a psychologist[4] (R. 44, 50) and review of psychologists' reports obtained through Burger's mother (R. 35-36, 44), convinced Leaphart that a more exhaustive investigation into Burger's background would not be a profitable pursuit.[5] He also concluded that presenting background and character evidence to the sentencing jury would have been at best unproductive (R. 34, 52), and at worst, harmful to his client (R. 73).

Leaphart decided to keep his client off the stand for a number of reasons. He testified that he was not able to keep Burger from talking about his crime to others. (R. 65). He believed that Burger enjoyed talking about the crime, *id.*, and he feared that petitioner would gloat about it on the stand. (R. 66). He did not believe that Burger's

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[4] The psychologist on whom Leaphart relied indicated that he would not be able to provide helpful testimony. (R. 50-51). Moving the trial court for appointment of additional psychiatric study would have been counterproductive, according to Leaphart, because he believed that the state court would have sent his client to a state hospital—one which, according to Leaphart, had a reputation for producing reports favorable to the prosecution. (R. 51).

[5] Q. Did you make any attempt to talk to the other people that he had lived with during his life?

A. I couldn't—didn't know who they were. I knew that [Burger] had been in wherever he had come from to go in the Army. He had been—he had lived there. And, then his mother and father had separated at an early age as I recall. He was down in Florida for a while. Had gotten in some trouble down in Florida and then he went back up North where he lived and got in some trouble up there. And, then he ended up in the Army. And, very basically, I couldn't find anything in Mr. Burger's background which I felt would be helpful. You know, I could have put his mother up, I'm sure. And, she could have said some nice things about him. But, my feeling was that a lukewarm witness would have without any real thing to say would have possibly been harmful. And, I felt—I just decided not to do it.

(R. 38).

mother would be able to provide testimony sufficiently useful to warrant calling her to the stand. "[S]he could not add anything . . . other than being a mother and saying I don't want you to put my child in jail, or in the electric chair." (R. 68). He also feared that during cross-examination she would disclose unfavorable information about her son. *Id.*

In *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984), another Georgia state prisoner under sentence of death also sought habeas relief by alleging, *inter alia*, that he received ineffective assistance of counsel at the penalty stage of his trial.

The Eleventh Circuit did

> [n]ot detect any semblance of ineffectual representation during the penalty stage of the trial to support Cape's charge that his lawyer did not present sufficient mitigating evidence. Counsel investigated potential mitigating evidence and presented that which he felt would reflect favorably to his client. The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not sufficient ground to prove ineffectiveness of counsel.

Id. at 1301.

It is true Cape's counsel presented some mitigating evidence while in the instant case petitioner's counsel presented no mitigating evidence. It is also true, however, that Leaphart's conversations with Burger, Burger's mother and family friend, together with his study of psychologists' reports, indicated to him that further investigation into this area would have been fruitless. Furthermore, and especially in light of his perception of Burger's personality, Leaphart, who had represented other death penalty defendants (R. 30, 58-59), feared opening the door to needless illumination of contrary character evidence by the prosecution on cross-examination. This

Court's inquiry is therefore properly focused on the reasonableness of Leaphart's investigation and decision regarding this rejected strategy. In that regard,

> [s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchangeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support *the limitations on investigation.* In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Washington, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695 (emphasis added). Further focusing on what "limitations on investigation" would be evaluated in assessing the reasonableness of an attorney's performance, the Supreme Court emphasized that

> [w]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States v. DeCoster*, 624 F.2d [196] at 209-210 [(D.C.Cir. 1976)].

Washington, 466 U.S. at ——, 104 S.Ct. at 2066-2067, 80 L.Ed.2d at 696.

Leaphart testified that Burger never gave him the names of any witnesses that might have been helpful to

him at trial. (R. 63). Despite this, Leaphart did consult as mentioned above, with Burger's mother and volunteer "big brother," (R. 77) and reviewed reports written by Burger's former psychologists. He was unable to unearth background information sufficiently helpful to warrant further investigation, nor to sway his decision not to emphasize petitioner's character at the second sentencing trial.

Petitioner Washington, like petitioner Burger, also confessed to, *inter alia*, his involvement in the crimes of kidnapping and murder. Unlike Burger, Washington had pleaded guilty and relied on an earlier plea colloquy with the sentencing judge, who had commended Washington for taking responsibility for his crimes. In both cases, however, defense counsel were faced with evidence of their clients' confessions, the overwhelming strength of the evidence against their clients and aggravating circumstances surrounding the crimes. In preparing for the sentencing hearing in *Washington*, counsel spoke with the defendant's

> wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. [cit]. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

466 U.S. at ——, 104 S.Ct. at 2057, 80 L.Ed.2d at 684. As in the instant case, Washington's "[c]ounsel decided to look no further for evidence concerning respondent's character and emotional state. That decision reflected [*inter alia*], trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." *Id.* The Supreme Court concluded that "[t]rial counsel could reasonably surmise from his conversations with [his client] that character and psychological evidence would be of little

help. . . . Restricting testimony on [Washington's] character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and [Washington's] criminal history, which counsel had successfully moved to exclude, would not come in." 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 701.[6] In

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[6] Within specified limits, Georgia prosecutors are permitted at capital sentencing trials to place the defendant's character in issue through his prior record or other criminal acts. "All aspects of [a convicted felon's] crime or crimes, his character and his attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact finder in determining appropriate sentence. *See Lockett v. Ohio*, 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] [cits]; *Collier v. State*, [244 Ga. 553, 261 S.E.2d 364 (1979)]." *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, *cert. denied*, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250, *reh'g denied*, 449 U.S. 1104, 101 S.Ct. 903, 66 L.Ed.2d 831 (1980); O.C.G.A. § 17-10-2. This may include "[a]ny lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes . . . subject to the notice provisions of the statute . . . [it] may [also] consist . . . of the defendant's attitude concerning his crime and the victim, the trier of fact's personal observation of the defendant, his conduct after incarceration and evidence of subsequent crimes." *Fair*, 245 Ga., at 873, 268 S.E.2d 316, quoted in *Zant v. Stephens*, 462 U.S. 862, —— n.22, 103 S.Ct. 2733, 2748 n.22, 77 L.Ed.2d 235, 256 n.22 (1983); *see also id.*, 462 U.S. at ——, 103 S.Ct. at 2743, 77 L.Ed.2d at 251 ("But the Constitution does not require the jury to ignore . . . possible aggravating factors [other than those specified in the sentencing statute] in the process of selecting . . . those defendants who will actually be sentenced to death."); *Id.*, 462 U.S. at —— n.17, 103 S.Ct. at 2743 n.17, 77 L.Ed.2d, at 251 n.17; *Godfrey v. Francis*, 251 Ga. 652, 660, 308 S.E.2d 806 (1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1930, 80 L.Ed.2d 475 (1984).

However, bad character evidence can be admitted only "[w]hen the defendant ha[s] been notified prior to trial that such evidence w[ill] be presented." *Brown v. State*, 235 Ga. 644, 649, 220 S.E.2d 922 (1975). The evidence must be geared toward providing " '[a]n *individualized* determination on the basis of the character of the individual and the circumstances of the crime.' [*Stephens*, 103 S.Ct. at] 2744 (emphasis in original)." *Ritter v. Smith*, 726 F.2d 1505,

addition, the mitigating evidence "[a]t most . . . show[ed] that numerous people who knew [Washington] thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to a level of extreme disturbance." *Id.*

In the instant case, counsel was faced with evidence of not only Burger's signed, but sworn confession, Tr 151-153), to participation in a gruesome crime. This evidence was bolstered by, *inter alia*, eyewitness and tangible evidence. The crime included petitioner's depraved act of asking the victim if he "was all right" before petitioner drowned him. Similar to the setting in *Washington*, counsel in the instant case was convinced from what he learned from his investigation that no productive result would obtain from further pursuing Burger's background, even in light of Leaphart's knowledge that Burger had come from a broken home, *see Griffin v. Wainwright*, 588 F.2d 1549, 1562 (M.D.Fla.1984), and that emphasizing character evidence would be the wrong strategy to employ. This judgment is not unreasonable, especially in light of the fact that calling a character witness to the stand is not without risk; there are, almost invariably, unknown poisons to be hatched out of the mud by way of

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1515 (11th Cir. 1984). In addition, the jury may not consider non-statutory aggravating circumstances unless it has found the existence of at least one statutory aggravating circumstance involved in the crime. *Stephens; Moore v. Zant*, 722 F.2d 640, 643-44 (11th Cir. 1984); *see also McCleskey v. Zant*, 580 F.Supp. 338, 390 (N.D. Ga. 1984). Such evidence must not be " 'constitutionally impermissible' or 'totally irrelevant to the sentencing process.' [*Stephens*, 103 S.Ct.] at 2747[.]" *Moore*, at 643. Furthermore, "[t]he defendant is accorded substantial latitude as to the types of evidence he may introduce." *Gregg v. Georgia*, 428 U.S. 153, 164, 96 S.Ct. 2909, 2921, 49 L.Ed.2d 859 (1976), citing *Brown; see also Raulerson v. Wainwright*, 732 F.2d 803 (11th Cir. 1984).

Nevertheless, there is no suggestion that State prosecutors may not elicit further information damaging to the defendant when cross-examining character witnesses called by a defendant. *See, e.g., Knighton v. Maggio*, 740 F.2d 1344, 1348 (5th Cir. 1984).

cross examination.[7] *See, e.g., Knighton v. Maggio*, 740 F.2d 1344, 1448 (5th Cir.1984) (defense counsel not ineffective when he made "the value judgment that the gain to be expected from the favorable testimony of family witnesses would not justify the risk of the potential harm from unfavorable testimony expected on cross-examination."). The reasonableness of the decision should be viewed not in hindsight, but primarily in light of the information supplied by the defendant. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696.

In *Collins v. Francis*, 728 F.2d 1322 (11th Cir.1984), Collins contended that his

> counsel was ineffective because he failed to investigate for possible use at the sentencing phase of his trial any evidence of mitigating circumstances. [Collins] allege[d] that counsel failed to look into his character and the record and the background of his family. He also allege[d] that counsel failed to contact his relatives and friends regarding testimony they might have been able to give on the issues of guilt or punishment.

Id. at 1349.

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[7] In an affidavit submitted to this Court, petitioner's uncle attests that petitioner came from a broken home and that he was unwanted by his parents. He opined that Burger had a split personality. "Sometimes [Burger] would be a nice, normal guy, then at times he would flip out and would be violent over nothing." Affidavit of Earnest R. Holtcsclaw at 1-2; *see also* Affidavit of Cathy Russell Ray at 1 ("He had a hairtrigger temper. He would get mad and punch the walls. Once he broke his knuckles he got so made."). On one hand, a jury could react with sympathy over the tragic childhood Burger endured. On the other hand, since Burger's sanity was not in issue in this case, the prosecution could use this same testimony, after pointing out that petitioner was nevertheless responsible for his acts, to emphasize that it was this same unpredictable propensity for violence which played a prominent role in the death of Burger's victim. *See* note 6, *supra*. "[M]itigation . . ." after all, [m]ay be in the eye of the beholder." *Stanley v. Zant*, 697 F.2d 955, 969 & n.11 (11th Cir. 1983) (footnote omitted).

Collins pointed to affidavits from friends who said they would have vouched for his good character at the trial. Collins' counsel stated "that Collins never gave him the names of such friends; consequently, he made no attempt to uncover any[,]" (*id.*) and the habeas court gave credence to counsel's testimony. The Eleventh Circuit accepted this finding and this factor figured into its conclusion that Collins was not denied effective assistance of counsel.

In the instant case, this Court similarly finds that Burger did not provide his attorney with the names of those individuals apparently located by Mr. Leaphart's successors. It is true that petitioner's current attorneys were successful in finding other witnesses who could paint a tragic childhood background; it is also true that they were able to "elicit" a more compelling explanation of Burger's background from his mother than did Leaphart. (R. 74-87).[8] That post-death sentence attorneys with greater resources materialize to illuminate, through the use of hindsight, weaknesses in the strategy employed by pre-sentence attorneys equipped with comparatively fewer resources, was apparently recognized by the Supreme Court in *Washington*, when it emphasized that

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a de-

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[8] The *Collins* court also found significant the fact that counsel reasonably concluded that Collins' mother would not have made a favorable impact on the jury. In the instant case, Leaphart testified that after interviewing Burger's mother, he concluded that she would not have made any further impact on the jury except that degree of sympathy which might have been derived from her putative plea to the jury for mercy for her son. Furthermore, he did not deem it wise to risk possible negative consequences from using her testimony. The Court does not find credible her assertion, made in response to a question asked by a post-death sentence attorney, that Leaphart never asked her about Burger's background. (R. 76).

> fendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 71 L.Ed.2d 783, 102 S.Ct. 1558 [1574-1575] (1982).

Washington, 466 U.S. at ——, 104 S.Ct. at 2065, 80 L.Ed.2d at 694; see also *Stanley v. Zant*, 697 F.2d 955, 964 n. 7, *reh'g denied*, 706 F.2d 318 (11th Cir.1983); *Williams v. Maggio*, 679 F.2d 381, 392 (5th Cir.1982) (en banc).

As mentioned above, courts must accord "a heavy measure of deference to counsel's judgments" 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, and pay heed to those instances where the defendant "has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful[.]" *Id.*, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 696. In such instances, "[c]ounsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* Indeed,

> in his argument to the jury at the sentencing hearing, [Burger's] lawyer made the strategic choice to focus on policy considerations against the imposition of the death penalty rather than call attention to the character of the petitioner. We cannot discredit counsel's trial tactics in pursuing this course, taking into consideration the overwhelming evidence of guilt and the bizzare nature of the crime.

Cape v. Francis, 741 F.2d at 1301.

As was the Eleventh Circuit in *Cape*, this Court is "[m]indful of the many obstacles and pitfalls that confront lawyers in the defense of capital murder cases.

The responsibilities and pressures are awesome. In retrospect, one may always identify shortcomings." *Id.*[9]

Indeed,

> [e]ffective counsel in a given case may consider the introduction of character evidence to be contrary to his client's interest. In other cases he may consider it unlikely to make much difference. In certain cases he may conclude that although available testimony might be minimally helpful, it would detract from the impact of another approach that he considers more promising . . . [Counsel's] knowledge of local attitudes, his evaluation of the personality of the defendant and his judgment of the compatibility of the available testimony and the jury's impression of the

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[9] See *Burger v. Zant*, 718 F.2d at 992-994 (Johnson, J. dissenting). In his dissent, Judge Johnson faulted Leaphart for "mak[ing] a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments." *Id.* at 992. Judge Johnson concluded that "the basic assumption on which this strategy was based is patently unreasonable[,]" (*id.*), since in the sentencing phase of the process there is no right of the defendant to open and close argument following the state's presentation of its evidence. O.C.G.A. § 17-10-2(a) & (c) (1982) (In the sentencing phase, "[t]he district attorney shall open and the defendant or his counsel shall conclude the argument."). With respect, this Court must disagree with Judge Johnson's conclusion. In response to questions aimed at illuminating Leaphart's over-all knowledge and capabilities in handling criminal cases, Leaphart indicated that "[i]n the trial in the *original* [*i.e.*, guilt/innocence phase of the] case[,]" he felt that the presentation of witness testimony would not have been worth the loss of his ability to open and close during the final argument phase of the trial. (R. 67) (emphasis added). O.C.G.A. § 17-8-71 (1982) specifies that "[i]f the defendant introduces no evidence, his counsel shall open and conclude that argument to the jury after the evidence on the part of the state is closed." Where a defendant does present evidence, he loses his right to open and close. *See, e.g., Hubbard v. State*, 167 Ga.App. 32, 305 S.E.2d 849 (1983). In fairness to Judge Johnson, this Court recognizes that it incorrectly applied this distinction in its original Order. *See Blake v. Zant*, 513 F.Supp. at 798.

> defendant, his familiarity with the reactions of the trial judge under various circumstances, his evaluation of the particular jury, his sense of the 'chemistry' of the courtroom are just a few of the elusive, intangible factors that are not apparent to the reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.

Stanley v. Zant, *supra*, 697 F.2d at 970.

In the instant case, it cannot be said that Leaphart's "[t]actical decision[] . . . amount[s] to ineffective assistance[, as it is not] so ill-chosen as to render the trial fundamentally unfair. [*Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696]." *Solomon v. Kemp*, *supra*, 735 F.2d at 402. Furthermore, " 'counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all available hope withers.' *Lovett v. Florida*, 627 F.2d 706 (5th Cir. 1980)." *Id.* This Court concludes that "[c]ounsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character . . . evidence that was already in hand was likewise reasonable." *Washington*, 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 701.

Because petitioner's showing is insufficient as to the performance prong of the *Washington* test, it is not necessary to address the prejudice prong. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 702 ("[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Accordingly, petitioner's claim that his counsel was ineffective because he failed to present mitigating evidence at his second sentencing trial is DENIED. "[On this particular claim, petitioner] has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Id.*

B. *Conflict of Interest*

Since an attorney's freedom from conflict of interest is an important consideration in any examination of his effectiveness (*see Burger v. Zant*, 718 F.2d at 987-991 (Johnson, J., dissenting), the Court will revisit its earlier conclusion. This claim is best analyzed by first examining what was and was not actually present in this litigation. As noted above, Burger and coindictee Stevens were tried separately. Each was represented by appointed counsel. Burger's counsel did employ a strategy adverse to Stevens' interests when he emphasized Stevens' greater culpability in the crime.

On the other hand, Stevens' counsel was also Leaphart's partner, Robert B. Smith. (R. 13-14). It is undisputed that the two lawyers made no attempt to construct a "Chinese Wall" between themselves. In fact, in varying degrees, they worked together on both cases at the trial and appellate levels. (R. 18, 40-41). Smith sat in with Leaphart on Burger's case, but Leaphart did not involve himself with Stevens' trial, which followed Burger's. (R. 18).

Leaphart was questioned on what effect, if any, his collaboration with Smith had on his resolve to represent Burger.

> THE COURT: Did you pull any punches in order to protect Stevens?
>
> A. No.
>
> THE COURT: If crucifying Stevens would have helped Burger, would you have done it?
>
> A. Yes, sir.
>
> Q. Did you do it?
>
> A. Didn't have the opportunity.

(R. 53).

As mentioned above, Leaphart did emphasize Stevens' greater culpability in the crime. He also investigated

Stevens to ascertain what, if anything, might be useful to his defense of Burger. (R. 54). In addition, he constantly attempted to plea bargain with the prosecutor in the case. (R. 65). However,

> A. [d]uring the first trial [the prosecutor] just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to—in that time to try to negotiate with the—the district attorney about entering a plea, for Mr. Burger to serve a life sentence. And he insisted on trying it and insisted on seeking the death penalty.

Id.

The prosecutor's flat refusal to engage in plea bargaining is not surprising when viewed in light of the strength of the case against Burger. As mentioned above, this evidence included Burger's signed, sworn confession (Tr. 151-153), which was coupled with a *Miranda* waiver (Tr. 201-203), along with eyewitness and tangible evidence. In addition, there is no suggestion that this evidence was not available to be used against Stevens. This background provides suitable perspective to the following examination by petitioner's federal habeas attorney:

> Q. Mr. Leaphart, did at any time during the representation did you talk to the District Attorney about the possibility of Mr. Leaphart (sic) testifying against Mr. Stevens?
>
> A. You mean Mr. Burger?
>
> Q. Mr. Burger, excuse me.
>
> A. No.
>
> Q. There was no discussion of his testimony in exchange for a lighter sentence for Mr. Burger?
>
> A. No, sir.

(R. 38-39).

Since the prosecution "flatly refused to even discuss" plea bargaining, it follows that Leaphart would not have talked to the prosecutor about offering his client's testimony against Stevens.

Leaphart testified that at no time did he believe a conflict of interest to exist in the case during the trials and appeals. (R. 62). Finally, the conflict of interest issue was never raised at the trial level. (R. 15).

The standards for reviewing a conflict of interest claim are well settled.

> For a conflict of interest to cause representation to fail Sixth Amendment standards, the conflict must be actual, not speculative. *United States v. Alvarez*, 696 F.2d 1307, 1309 (11th Cir.1983), *cert. denied*, 461 U.S. 907, 103 S.Ct. 1878, 76 L.Ed.2d 809 (1983); *Baty v. Balkcom*, 661 F.2d 391, 395 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *Baty v. Balkcom, supra*, at 396.

United States v. Ard, 731 F.2d 718, 726-727 (11th Cir. 1984); *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983); *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983); see also *Barham v. United States*, 724 F.2d 1529 (11th Cir.1984) (not all conflicts are so egregious as to constitute a Sixth Amendment claim). Judge Johnson stated that Leaphart and Smith acted as one attorney; that Leaphart in effect represented both Burger and Stevens. 718 F.2d at 988. Setting aside the fact that Burger and Stevens received separate trials, the Court turns to *United States v. Carr*, 740 F.2d 339 (5th Cir.1984), where the Fifth Circuit stated that

> "[a]conflict of interest is present whenever one defendant stands to gain significantly by counsel ad-

> ducing probative evidence of advancing plausible arguments that are damaging to a codefendant whom counsel is also representing." [cits]. In assessing whether or not such conditions are present in a particular case the attorney representing both defendants "is in the best position professionally and ethically to determine when a conflict of interest exists. . . ." *Cuyler* [*v. Sullivan*], 446 U.S. [335] at 347 [100 S.Ct. 1708, 1717, 64 L.Ed.2d 333] [cits].

740 F.2d at 348.

The mere fact that the attorneys assisted each other in Burger and Stevens' cases does not convince this Court that a conflict of interest has been shown. Although it may be said that the two attorneys at times acted as one while each prepared for trial and appeal, any inducement of Leaphart to actively represent conflicting interests—"to pull any punches" in his representation of Burger—would be at best speculative, not actual. There has been no showing that Leaphart "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Mers*, 701 F.2d at 1328. In fact, Leaphart testified that he neither felt nor recognized the existence of a conflict of interest when he represented Burger. (R. 62). Nor can it be said that the overlap of counsel, to the extent it existed, infected Leaphart's representation so as to constitute an "active representation of conflicting interests." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980).

Accordingly, the Court affirms its earlier conclusion that petitioner is not entitled to relief on this ground.

To summarize, petitioner's claim that his attorney provided ineffective assistance of counsel at the second sentencing trial in this case is without merit. In addition, no conflict of interest on the part of his attorney has been shown.

SO ORDERED, this 10 day of October, 1984.

/s/ B. Avant Edenfield
Judge
United States District Court
Southern District of Georgia

JOHNSON, Circuit Judge, dissenting:

I dissent from the majority's adoption of the district court order denying Burger's claim that he was deprived of effective assistance of counsel. A review of the record reveals that Burger was denied the effective assistance of counsel by both his appointed counsel's active representation of his co-indicteee's conflicting interest and his counsel's failure to present any evidence on his behalf at either of his two sentencing proceedings.

The general principles applicable to ineffective assistance of counsel claims were articulated in *Strickland v. Washington*, —— U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also King v. Strickland*, 748 F.2d 1462 (11th Cir.1984). To demonstrate that the assistance provided by counsel was so deficient as to require reversal, a defendant must make a two-pronged showing. First, he must demonstrate that his counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 2064. Such errors must be outside the generous range given to "reasonable professional judgment." *Id.* at 2066. Second, the defendant must demonstrate that he was prejudiced by the deficient performance. To meet this portion of his burden, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 2068. A court reviewing an ineffective assistance claim, however, must bear in mind that

> the ultimate focus of inquiry must be on the fundamental fairness of the proceeding. In every case the court should be concerned whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system relies on to produce just results.

Id. at 2069.

The Court in *Strickland v. Washington* also considered the showing that is required when a defendant argues that counsel was ineffective by reason of conflict of interest.[1] Where counsel breaches the duty of loyalty to his client, a limited presumption of prejudice applies. *Strickland v. Washington, supra,* 104 S. Ct. at 2067; *Cuyler v. Sullivan,* 446 U.S. 335 345-350, 100 S.Ct. 1708, 1716-1719, 64 L.Ed.2d 333 (1980). Prejudice is presumed if the defendant can demonstrate that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington, supra,* 104 S.Ct. at 2067; *Cuyler v. Sullivan, supra,* 446 U.S. at 350, 348, 100 S.Ct. at 1719, 1718.

Turning first to Burger's conflict of interest claim, the record is clear that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both were appointed counsel by the trial court at approximately the same time. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart also testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Both lawyers discussed the issues involved in each case and researched the law together.[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court

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[1] The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Glasser v. United States,* 315 U.S. 60, 70, 62 S.Ct. 457, 464, 86 L.Ed. 680 (1942); *United States v. Alvarez,* 580 F.2d 1251, 1254 (5th Cir. 1978).

[2] Transcript of Federal Habeas Corpus Hearing ("THC") at 18.

of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one law firm represented both Burger and Stevens,[5] the

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[3] THC at 40-41.

[4] The warden-appellant argues that the conflict of interest cases relied upon by Burger are inapposite as involving the representation of multiple defendants by one attorney. Here, appellant contends, Burger and Stevens were represented by "separate" attorneys. This argument is contrary to the facts as reflected by the record. Leaving aside the fact that Leaphart and Smith were partners in the practice of law, the attorneys here were each active in the defense of the other's client and "seem to have viewed themselves as a defense 'team' acting on behalf of [both] of th accused." *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 515 (3d Cir. 1979), *rev'd on other grounds, Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart consulted confidentially with Stevens, aided in preparing his case for trial, and prepared the briefs for both of his appeals. "Whatever may have been the extent of each attorney's participation in the trial of the . . . defendants, we are satisfied that it was sufficient to establish that both attorneys represented [both] defendants." *Id.*

[5] "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir. 1980) (*quoting United States v. Helton*, 471 F. Supp. 397, 399 n.1 (S.D.N.Y. 1979)); *see also United States v. Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir. 1979) (ineffective assistance found where "[t]he law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the state prosecutor who tried Zuck."); Fed.R.Crim.P. 44(c) ("[w]henever two or more defendants have been jointly charged . . . and are represented by . . . retained or appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his

end result was that Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[6] a finding of multiple representation alone does not establish ineffective assistance of counsel. The conflict must be shown to be actual, not merely speculative, before representation will violate Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d 391, 397 (5th Cir. Unit B 1981). "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.'" *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.1979)) (*quoting Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, *supra*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another whom the same counsel is representing.").

In this case the fundamental issue framed by counsel was not Burger's guilt but the extent of his culpability.

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right to the effective assistance of counsel, including separate representation."), *construed in Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates its recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent co-defendants with conflicting interests."); *ABA Code of Professional Responsibility* DR 5-105(d). Further, the Supreme Court of Georgia, exercising its supervisory role over the Bar, has adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. *Fleming v. State*, 264 Ga. 90, 270 S.E.2d 185 (1980). This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Id.* at 188 n.7.

[6] *See Cuyler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("[a] possible conflict of interest inheres in almost every instance of multiple representation"); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978).

At the habeas corpus hearing, Leaphart exhaustively reviewed the evidence that the extent of Burger's culpability was less than that of Stevens.[7] In sum, this evidence was as follows. At the time the crime was committed, Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger was the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In this situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. Such adversity in the interests of Leaphart's clients demonstrates that an actual conflict of interest existed. *See Zuck v. Alabama*, *supra*, 588 F.2d at 439 (adversity sufficient to demonstrate actual conflict of interest exists if "the attorney owes a duty to the defendant to take some action that could be detrimental to his other client").

The evidence provided by petitioner also demonstrates that this conflict "adversely affected his lawyer's performance." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2052. On several occasions, Leaphart refrained from taking actions in support of Burger that would have been detrimental to Stevens. For example, at no time in his

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[7] THC at 20-23.

representation of Burger did Leaphart offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom, supra*, 661 F.2d at 397 N. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, 189 (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). The district attorney's disinclination to plea bargain did not stop Leaphart from "constantly attempting" to bargain for a life sentence; there is no reason why it should have deterred him from making the more attractive offer to Burger's testimony against Stevens. Moreover, at Burger's trial Stevens was not called as a witness by the defense. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to

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[8] At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. THC at 38-39. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "*during the first trial* [the district attorney] refused to discuss it in any terms." THC at 65 (emphasis supplied). From this account, it appears that plea negotiations were entered into in this case; that Leaphart never offered Burger's testimony against Stevens; and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testifying against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no *pretrial* conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.

the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. 17-10-35(c)(3) (1982), formerly Ga.Code Ann. 27-2537(c)(3) (1933).

Once a defendant has made the two showings required by *Strickland v. Washington*, *supra*, prejudice is presumed. 104 S.Ct. at 2067. *See also Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983); *Baty v. Balkcom*, *supra*, 661 F.2d at 395 ("when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless") (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir.1981)). Even accepting the district court's finding, adopted by the majority in this case, that Leaphart did not "tailor[] his [trial] strategy toward protecting Stevens," there is sufficient evidence of an actual conflict and of tangible adverse effect on Leaphart's performance establish a Sixth Amendment violation.[9]

Burger also argues that he was denied the effective assistance of counsel because Leaphart failed adequately to investigate possible mitigating evidence or to present *any* evidence, in mitigation or otherwise, at either of his two sentencing proceedings. Counsel's duty of effective representation continues into the sentencing phase of his

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[9] The district court appears to take the position that it would not be possible to make a full demonstration of prejudice of the type, for example, that is required for general ineffective assistance claims under *Strickland v. Washington*. Whether or not such a showing would be possible is not relevant, however, to the issue of conflict of interest. In conflict of interest cases, as noted above, a limited presumption applies on a showing of some "adverse effect" on the lawyer's performance, which has been amply demonstrated in the instant case.

client. *See Stanley v. Zant*, 697 F.2d 955, 963 (11th Cir. 1983) ("The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial."). At the core of the duty of effective representation is the "independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). To fulfill this obligation, counsel must make reasonable investigations or make a reasonable decision that makes further investigation unnecessary. *Strickland v. Washington*, 104 S.Ct. at 2066. An examination of the relevant facts suggests that Leaphart failed in both his duty of investigation and his duty of representation at the sentencing proceeding.

The district court found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother and an attorney who had befriended her. Although the content of those conversations and the identity of possible character witnesses were not clear, the district court concluded that Leaphart made "adequate if hardly ideal inquiries" and that his "investigation appears to meet at least minimal professional standards." Such an investigation should not be characterized as reasonable or substantial. Moreover, even the scant amount of information which was unearthed through Leaphart's investigation was not presented in the proceeding itself. Nor can it be said that Leaphart's choice to curtail investigation and to present no evidence at the sentencing proceedings was a reasonable strategic decision based on reasonable assumptions. Leaphart has attempted to justify his approach by reference to three strategies or assumptions: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before,

which would have been undercut by an investigation into and testimony concerning Burger's background. Even conceding that broad range must be given to the operation of professional judgment, *Strickland v. Washington*, 104 S.Ct. at 2065-66, none of these strategies or assumptions withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District attorney prove his case. And my theory of defense was to—well, that is in effect in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.[10]

And, specifically concerning the second trial solely on the issue of penalty, Leaphart again testified that he "felt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts." [11] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but rather reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all; and reliance on such a strategy in a capital sentencing proceeding, as an alternative to investigating and presenting available mitigating evidence, is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. 27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital

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[10] THC at 18.

[11] THC at 52.

cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and the defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.[12]

The district court also found that Leaphart's failure to substantially investigate mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding stressed Burger's comparative lack of culpability and asked for the jury's mercy. This argument would not have been undercut by the presentation of humanizing evidence concerning Burger's background.

In short, Leaphart's decision neither to conduct substantial investigation nor to present any evidence at the sentencing proceedings was not a reasonable strategic choice. It was, moreover, readily distinguishable from the choices made by attorneys in those cases relied upon by

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[12] The district court's explanation that Leaphart's rationale was appropriate in the context of the culpability trial provides no justification for its application in the context of a sentencing proceeding where, as noted above, the Georgia procedural rules are different.

the district court. In *Cape v. Francis*, 741 F.2d 1287 (11th Cir.), the district court found that petitioner's attorney presented some mitigating evidence during the sentencing proceeding; and in *Strickland v. Washington*, *supra*, petitioner's attorney relied on character testimony that had come in at an earlier plea colloquoy. 104 S.Ct. at 2071. Leaphart's presentation of no evidence in the instant case is different; it represented an error "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2064.

But the Sixth Amendment inquiry does not end with a finding of unreasonable performance by counsel. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Id.* In this case, however, prejudice is apparent.

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. This evidence demonstrated that Burger's parents had been married when his mother was fourteen and his father was sixteen. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent being shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida, his stepfather told him he could not stay with them. Burger's mother told juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger

was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

I cannot accept the holding that the failure to present this evidence was not prejudicial to Burger. The district court found that, although the affidavits of the character witnesses supplied by Burger at the hearing do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not that Burger was a model citizen, but that Burger's personality and motivation could be explained by his unusually stormy childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case," *Stanley v. Zant*, *supra*, 697 F.2d at 969, Leaphart elected neither to conduct further investigation nor to use the evidence at the sentencing proceeding. Having heard the state's case, unmitigated by any evidence presented on behalf of petitioner, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Strickland v. Washington*, *supra*. In fact Leaphart's failure to investigate or to present evidence on his client's behalf is an apt example of the kind of "breakdown in the adversarial process," *id.* at 2069, that requires a reviewing court to find the results of a proceeding unreliable.

For these reasons, I would reverse the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and remand this case with directions to grant the writ.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7419

CHRISTOPHER A. BURGER, PETITIONER-APPELLEE,
CROSS-APPELLANT

v.

RALPH KEMP, Warden, Georgia Diagnostic and
Classification Center, RESPONDENT-APPELLANT,
CROSS-APPELLEE

March 13, 1986

Appeals from the United States District Court
for the Southern District of Georgia

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

PER CURIAM:

This habeas corpus action, before us for the third time, was remanded by the Supreme Court for our re-

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

consideration in light of *Francis v. Franklin*, —— U.S. ——, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), *aff'g* 720 F.2d 1206 (11th Cir.1983). The facts of the underlying murder case, for which petitioner Burger was sentenced to death, are reported at *Blake v. Zant*, 513 F.Supp. 772, 788-89 (S.D.Ga.1981). The sole issue now before us is whether the trial court's jury instruction on intent impermissibly shifted the burden of proof on that issue to the defendant. We hold that the challenged instruction constituted harmless error. In our previous opinions, 718 F.2d 979 (11th Cir.1983), 753 F.2d 930 (11th Cir.1985), we found the other issues presented in Burger's habeas petition to be without merit. Consequently, we remand to the district court with instructions that the writ be denied.

In *Franklin*, the petitioner argued that the state trial court erred in giving the following jury instruction:

> A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Franklin, —— U.S. ——, 105 S.Ct. at 1969-70; 720 F.2d at 1209 n. 2. The Supreme Court agreed with our conclusion that this instruction was constitutionally infirm under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), because a reasonable juror could understand it as creating a mandatory—though rebuttable—presumption of intent shifting the burden of proof on that issue to the defense. —— U.S. at ——, 105 S.Ct. at 1977; 720 F.2d at 1212. The Court also agreed with our finding that under the circumstances of the case, the *Sandstrom* error could not be considered harmless. *Id.*

The jury instruction challenged in this case is virtually identical to the one held unconstitutional in *Franklin*. After giving the *Franklin* instruction, however, the court in this case added the following:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake, 513 F.Supp. at 792.

This additional language, taken by itself, appears to be constitutionally unobjectionable; rather than creating a mandatory presumption, it merely instructs the jury that it *may* presume intent from the natural consequences of an act. The Supreme Court made clear in *Franklin*, however, that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." —— U.S. at ——, 105 S.Ct. at 1975. Thus, whether this additional language sufficed to render the instruction constitutional may depend upon whether the language is viewed as clarifying or merely contradicting the erroneous charge which preceded it.

We need not reach this issue, however, because we conclude that any error in the instruction was harmless. In *Franklin* the defendant had based his entire defense on the issue of intent, and "[t]he facts did not overwhelmingly preclude that defense." 720 F.2d at 1212. We thus concluded that "[b]ecause intent was plainly at issue in [the] case, and was not overwhelmingly proved by the evidence . . . we cannot find this error to be harmless." *Id.* The Supreme Court agreed. —— U.S. at

——, 105 S.Ct. at 1977. On the other hand, if intent is *not* at issue in a case, or if intent *is* overwhelmingly proved, a *Sandstrom* error on the element of intent may be found harmless. *Davis v. Kemp*, 752 F.2d 1515, 1521 (11th Cir.) (en banc), *cert. denied*, —— U.S. ——, 105 S.Ct. 2689, 86 L.Ed.2d 707 (1985).[1]

In this case, Burger's sole defense was to put the prosecution to its proof. As the essence of such a defense is to require the state to fulfill its burden as to each element of the offense, it cannot be said that intent was not at issue. *Cf. id.* (defense of non-participation removes intent from issue even without explicit concession). Nevertheless, it is significant that Burger chose not to raise the issue of intent expressly, for this left uncountered the strong implication of intent which was bound to arise from the evidence presented by the state.

The record tends to show that after sexually assaulting their victim, Burger and his co-defendant placed the victim in the trunk of his taxicab. After telling a friend what they had done, they drove to a water-filled pit. Opening the trunk, Burger found that the victim was still alive. With the victim still inside Burger then closed the trunk once more, removed incriminating fingerprints from the vehicle, and drove the car into the pond, jumping out as the car entered the water. The victim died of drowning. Eventually, Burger confessed to the crime, described the incident in great detail, and led authorities to the pit, pointing out where they could find the victim's body.

Burger's only argument as to why the *Sandstrom* error should not be considered harmless in light of the overwhelming evidence from which the jury could infer intent is that he had consumed "four or five pitchers of beer" before the incident. This, he argues, brings his

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[1] We note that the Supreme Court has recently granted certiorari in a case in which it may consider whether a *Sandstrom* error was harmless. *Rose v. Clark*, 762 F.2d 1006 (6th Cir.), *cert. granted*, —— U.S. ——, 106 S.Ct. 59, 88 L.Ed.2d 48 (1985).

case under our decision in *Thomas v. Kemp*, 766 F.2d 452 (11th Cir.1985), in which a *Sandstrom* error on intent was found not harmless where the defendant was intoxicated. In *Thomas*, however, the defendant affirmatively raised the issue of intent:

> Thomas took the stand in his own defense and testified that he had no memory of the incident . . . He attributed his lack of memory to pills he . . . ingested. . . . Thomas' counsel elicited testimony from the State's examining psychiatrist that it would be possible for a drug to "overmaster [a] person's will or impel him to commit a crime," . . . [and] requested and obtained a jury charge on drug intoxication. . . .

766 F.2d at 455-56. By contrast, Burger raised no intoxication defense. Burger's counsel mentioned the beers in his opening statement and Burger's confession referred to them, but the defense made no attempt to argue that the alcohol in any way diminished Burger's capacity or rendered him incapable of forming an intent to commit the murder.

Under *Sandstrom*, a jury may never be instructed that intent is or must be presumed. Nevertheless, a case may present circumstances which imply intent so overwhelmingly that a reviewing court may conclude that any reasonable jury would infer intent even without being instructed that it had to do so. This is such a case. We are convinced beyond a reasonable doubt that a reasonable jury would have convicted Burger without having to interpret the jury instructions as creating a mandatory presumption of intent. We therefore hold that any error in the instructions was harmless.

The case is REMANDED to the district court with instructions that the writ be denied.

JOHNSON, Circuit Judge, dissenting:

In *Franklin v. Francis*, —— U.S. ——, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the United States Supreme Court held that a jury instruction virtually identical to one given in this case was unconstitutional because a reasonable juror could have understood it to shift to the defendant the burden of proof on the issue of intent. The majority does not reach the issue of whether additional language rendered this instruction constitutionally permissible in the instant case, because the majority holds that, even if the instruction was unconstitutional, any error in the instruction was harmless. In coming to this conclusion, the majority misreads the record of petitioner's trial in state court. I dissent.

I. Constitutionality of the Challenged Instruction

It is clear that the challenged instruction in the instant case violated *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and its progeny, and therefore was unconstitutional. As in *Franklin*, the jury was instructed: "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." A reasonable juror could have understood this instruction to create "a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." *Franklin, supra*, 105 S.Ct. at 1972.

The instruction in the instant case was followed by a further instruction, which stated:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed

> from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake v. Zant, 513 F.Supp. 772, 792 (S.D.Ga.1981). As the majority notes, the Supreme Court stated in *Franklin* that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Franklin*, *supra*, at 1975. The Court continued, "A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id.*

The instruction following the *Franklin* instruction in this case does not explain the *Franklin* instruction. In stating that the jury *may* presume intent from the natural consequences of an act, the second instruction merely contradicts the first. In this situation, we are required to hold that the *Franklin* instruction was unconstitutional.

II. Harmless Error Analysis

Where a burden-shifting instruction on intent constitutes *Sandstrom* error, the error can be held harmless if the court can say beyond a reasonable doubt that the fault instruction did not contribute to the verdict obtained. *Davis v. Kemp*, 752 F.2d 1515, 1521 n. 7 (11th Cir.1985) (en banc) (*quoting Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). This Court has identified two situations where a *Sandstrom* violation on the issue of intent can be held harmless: (1) where intent is not at issue in the case, or (2) where the evidence of intent is overwhelming. *R. Tucker v. Kemp*, 762 F.2d 1496, 1502 (11th Cir.1985) (en banc).

The majority holds that in the instant case the petitioner's sole defense was to put the prosecution to its proof. The majority concludes that, although this defense put intent at issue, the defense "left uncountered

the strong implication of intent which was bound to arise from the evidence presented by the state." The majority therefore holds that the evidence of intent in this case was overwhelming, and that the *Sandstrom* error was harmless.

A reading of the state trial transcript reveals that Burger's defense entailed far more than simply putting the prosecution to its proof. Throughout the trial, Burger's counsel sought to show that Burger's co-defendant Stevens was the moving force behind the entire crime, and that Burger was merely a follower who did what Stevens told him to do. Indeed, the district court in this case has found that an examination of the trial record shows considerable effort to portray Stevens as the chief architect of the crime. *Blake*, *supra*, at 795. The essence of Burger's defense was that, although Burger took part in the crimes, he did so under duress and did not have the requisite intent for murder.

The state's main evidence in the guilt phase of this case came from a confession given by Burger and from testimony by James R. Botsford, who was in the same military unit as Burger and Stevens and was their squad leader. The confession was read to the jury by witness Clarence Haire, trial transcript ("tr.") at 278-286, who had taken the confession. In his confession, Burger stated that he and Stevens were out drinking on the night of the crime and ran out of money. Stevens suggested to Burger that they could get some money by robbing a cab driver. Stevens and Burger arranged to take a taxicab to the airport, where they were to pick up Botsford.

On the way to the airport, Stevens pulled a butcher knife on the cab driver, the victim of the crime. After the victim said that he had only sixteen dollars, Stevens forced the victim to get out of the cab and remove his clothes. Stevens discarded the clothes and got in the rear of the vehicle with the cab driver. While Burger was driving, Stevens forced the victim to perform oral sodomy

upon him, and Stevens then performed anal sodomy on the victim. At some point, Burger stopped the car and the victim was put in the trunk of the car.

Burger and Stevens picked up Botsford at the airport and proceeded to drive Botsford back to Fort Stewart, their military base. Botsford asked Burger why he was driving the taxicab, and Stevens answered that they had "taken" the taxicab. Stevens told Botsford that the cab driver was in the trunk, and indicated that they were going to kill the cab driver. As Botsford got out of the car at the base, he asked them not to kill the victim.

Burger and Stevens drove the vehicle away, and then encountered a patrol vehicle. When the patrol vehicle went by, Stevens told Burger that they were going to "get burnt," and that they had to do something with the cab. Stevens told Burger to drive to a nearby pond. At the pond, Stevens directed Burger to wipe the fingerprints off the car. Stevens then directed Burger to put the car in gear and run it into the pond.

After doing this, Burger started to walk away and told Stevens he was leaving. Stevens told him he could not leave, "because we have to make sure—want to make sure the car goes down, with the man in the trunk."

In his cross-examination of Mr. Haire, Burger's counsel asked, "Now, your testimony to this jury as to what Burger told you—based on your testimony, is it not, as to what he said and what is contained in his statement, that Stevens was the one that said drive it to the pond, and Stevens more or less directed the whole operation, according to your testimony; is that correct?" Tr. at 297. The court sustained an objection to the question, stating to Burger's counsel: "You're getting into the province of the jury to determine the facts of the situation." *Id.* Burger's counsel then elicited from Mr. Haire the fact that Burger was only 17 years old at the time of the crime.

Mr. Botsford was the key witness for the state. On cross-examination by Burger's counsel, Mr. Botsford gave the following testimony:

Q. Mr. Botsford, I think you were friends—you say you were friends with Chris Burger and Tom Stevens in boot camp?

A. That's correct.

Q. When they—when you got in the cab and you heard this voice or whatever it was in the back of the cab, did you know who that was?

A. No, I didn't.

Q. So you don't know of your own knowledge whether that was Roger Honneycutt or not; do you?

A. I didn't know him by name. I knew it was the cab driver.

Q. You just knew it was the cab driver back there?

A. The cab driver of the cab.

Q. Well, that's just because they told you it was; isn't that right?

A. That's right.

Q. And, the person that told you that was Stevens?

A. That's correct.

Q. In fact, Stevens was the one that was doing all the talking; wasn't he?

A. Most of it.

Q. And, Burger was just sorta going along, sorta doing sorta like Stevens was telling him to do; wasn't he?

A. Sorta.

> Q. I think you said that when you said something about turning the cab driver loose, Burger agreed that was the thing that should be done?
>
> A. That's correct.

Tr. at 111.

A clinical psychologist testified that Burger had an IQ of 82, and that Burger lacked the motivation or power of reasoning to learn from previous experiences. Tr. at 247. The psychologist also testified that Burger was "functioning probably at the level of about a twelve year old person." Tr. at 248.

Finally, in closing argument at the guilt phase, Burger's counsel sought to emphasize the evidence that had been produced indicating that Stevens was in control of the crime. Counsel said:

> One of the interesting things is the testimony here by Botsford was all about Stevens, what Stevens did. what Stevens said; not what Burger did or what Burger said. I would have thought and you may gather that we weren't trying Chris Burger here; we were trying Thomas Stevens. Don't convict Burger on what somebody said about Stevens, because Stevens is not on trial. Burger is on trial.

Tr. at 371-72.

It is clear from the foregoing that Burger's defense did not consist merely of putting the prosecution to its proof. Rather, Burger presented substantial evidence, and argument based on that evidence, that his participation in the crime was under the direction and control of Stevens. Stevens did virtually all the talking and gave all the orders. The crime and the killing were Stevens' ideas. Botsford testified that, when Botsford suggested that the cab driver should be set free, *Burger agreed that this was what should be done.*

Burger's defense went squarely to the issue of whether he intended to kill the victim. I cannot agree with the

majority that the evidence of Burger's intent to kill was overwhelming. In finding that Burger had the requisite intent, the jury might have relied on the faulty instruction that a person is presumed to intend the natural and probable consequences of his acts. I cannot say beyond a reasonable doubt that the faulty instruction did not contribute to the verdict obtained. *Davis, supra*, at 1521 n. 7. Accordingly, I dissent.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7419

CHRISTOPHER A. BURGER, PETITIONER-APPELLEE,
CROSS-APPELLANT

v.

RALPH KEMP, Warden, Georgia Diagnostic and
Classification Center, RESPONDENT-APPELLANT
CROSS-APPELLEE

July 23, 1986

Appeal from the United States District Court
for the Southern District of Georgia

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 13, 1986, 11 Cir., 785 F.2d 890)

PER CURIAM:

The panel opinion of March 13, 1986 should not be interpreted as requiring a defendant to place intent ex-

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

plicitly in issue before he can prevail on a challenge to burden shifting instructions on criminal intent. The panel majority simply noted that evidence of intent is more likely to be overwhelming where the defendant has not attempted to counter the state's evidence on criminal intent.

With the foregoing clarification of the panel opinion the petition for panel rehearing is DENIED and no member of this panel nor other judge in regular active service on the court having requested that the court be polled on rehearing en banc, Fed.R.App.P. 35, 11th Cir. Rule 26, the suggestion for rehearing en banc is DENIED.

Judge JOHNSON adheres to the views previously expressed in his dissent from the panel opinion.

SUPREME COURT OF THE UNITED STATES

No. 86-5375

CHRISTOPHER A. BURGER, PETITIONER

v.

RALPH KEMP, Warden

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis, be and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 3, 1986